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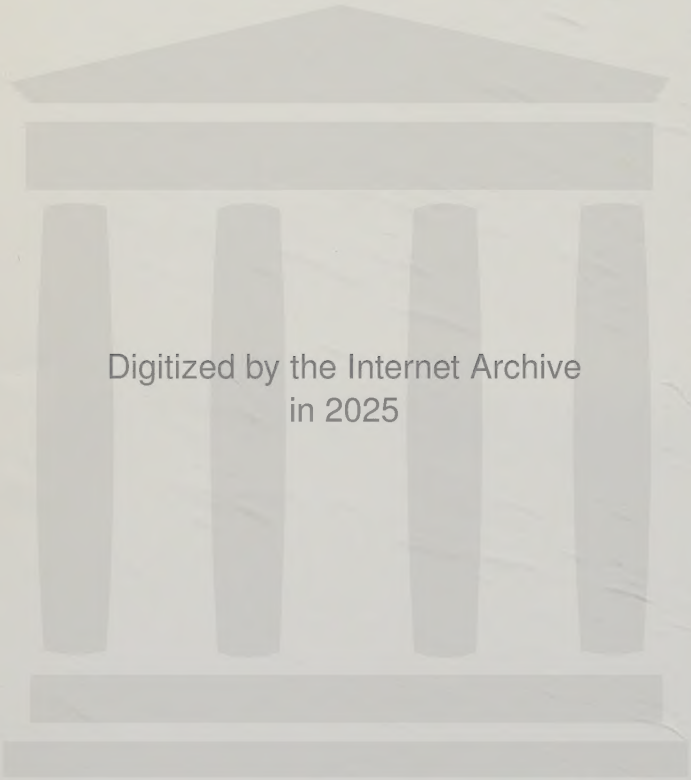
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COMMENTARIES

ON

AMERICAN LAW.

By JAMES KENT.

VOLUME I.

ELEVENTH EDITION,

EDITED BY

GEORGE F. COMSTOCK.

BOSTON:
LITTLE, BROWN, AND COMPANY.
1866.

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[L. S.]

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PREFACE

TO THE ELEVENTH EDITION.

Soon after my retirement from the Bench, at the commencement of the year 1862, I was requested by James Kent, Esq., of New York, the grandson of the distinguished Chancellor, to prepare a new edition of these Commentaries.

The work had already been copiously annotated, first by the author, and afterwards by his son, Judge William Kent, himself an accomplished lawyer and jurist. To the tenth edition fresh notes had been added of the more recent decisions and statutory enactments.

These annotations greatly relieved the task which would otherwise have been imposed upon me. Of course it was necessary to explore the field of judicial decisions made and statutory laws enacted since the last edition. This has been done, I think I may say, with fidelity, and the results added to the pre-existing notes. Where the notes of former editions could be conveniently condensed or incorporated with the new matter this has also been done, and I have not hesitated to correct occasional inaccuracies in the deduction or statement of principles derived from the cases referred to. No change, however, has been made in the text or in the notes prepared by the commentator himself. As in the previous editions, published since his death, these have been left untouched. In a very few instances, where the doctrine of the text has seemed to me opposed to the existing rule on the same subject, I have ventured to set forth the conflicting view in the notes with appropriate references to authority.

In performing these labors I have been more than ever impressed with the accurate and consummate learning of the author, and the great value of his volumes to the student and the profession. My utmost wishes are attained if I have been able to add anything to the usefulness of a work already so highly and universally appreciated.

GEORGE F. COMSTOCK.

SYRACUSE, December, 1865.

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TO THE SEVENTH EDITION.

The seventh edition of Kent's Commentaries is the first that has been published containing any additions or alterations not made by the Author. As the work has become, in a great degree, a Digest of American Law, of practical use to the lawyer as well as the student, the Editor has endeavored to collect the principal decisions and statutory enactments that have been made since the appearance of the last edition. In some few instances, he has attempted, in a very limited manner, to illustrate or qualify some of the doctrines of the text.

The Editor is aware that this mode of collecting authorities is incompatible with exact method, and is, indeed, condemned by the Author himself; and it is quite possible that the original notes to the Commentaries, which were made at successive times, without regard to strict order, might be advantageously regulated and compressed. But, on reflection, he has not felt himself authorized to impair, in any degree, the integrity of the Commentaries, and the text and notes are presented in this edition as they were left by the Author.

The great increase of the work has rendered the Author's index altogether too limited. A new and enlarged index has accordingly been added; and, as a necessary effect of this index, a new numbering of the pages has been adopted. For the convenience of those possessing the previous publications of the work, the original numbers of the pages have been placed in the margins of the volumes.

It remains only for the Editor to mention, that the present edition has been prepared by him, with the full and equal co-operation of his friend Dorman Bridgman Eaton, Esq., who has recently become a resident of New York; and whose learning and talents must hereafter, in their independent exercise, become manifest to the profession.

WILLIAM KENT.

New York, May, 1851.

TO

WILLIAM JOHNSON, Esq.

Dear Sir, —

In compiling these volumes, (originally intended, and now published for the benefit of American students,) I have frequently been led to revisit the same ground, and to follow out the same paths, over which I have so often passed with you as a companion to cheer and delight me.

You have reported every opinion which I gave in term time, and thought worth reporting, during the five-and-twenty years that I was a Judge at Law and in Equity, with the exception of the short interval occupied by Mr. Caines's Reports. During that long period I had the happiness to maintain a free, cordial, and instructive intercourse with you; and I feel unwilling now to close my labors as an author, and withdraw myself finally from the public eye, without leaving some memorial of my grateful sense of the value of your friendship, and my reverence for your character.

In inscribing this work to you, I beg leave, sir, at the same time, to add my ardent wishes for your future welfare, and assure you of my constant esteem and regard.

JAMES KENT.

PREFACE

TO THE FIRST VOLUME OF THE FIRST EDITION.

HAVING retired from public office in the summer of 1823, I had the honor to receive the appointment of Professor of Law in Columbia College. The trustees of that institution have repeatedly given me the most liberal and encouraging proofs of their respect and confidence, and of which I shall ever retain a grateful recollection. A similar appointment was received from them in the year 1793; and this renewed mark of their approbation determined me to employ the entire leisure, in which I found myself, in further endeavors to discharge the debt which, according to Lord Bacon, every man owes to his profession. I was strongly induced to accept the trust, from want of occupation; being apprehensive that the sudden cessation of my habitual employment,[1] and the contrast between the discussions of the forum and the solitude of retirement might be unpropitious to my health and spirits, and cast a premature shade over the happiness of declining years.

The following Lectures are the fruit of the acceptance of that trust; and, in the performance of my collegiate duty, I had the satisfaction to meet a collection of interesting young gentlemen, of fine talents and pure character, who placed themselves under my instruction, and in whose future welfare a deep interest is felt.

Having been encouraged to suppose that the publication of the

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[1] I was appointed Recorder of New York in March, 1797, and from that time until August, 1823, I was constantly employed in judicial duties.

Lectures might render them more extensively useful, I have been induced to submit the present volume to the notice of students, and of the junior members of the profession, for whose use they were originally compiled. Another volume is wanting, to embrace all the material parts of the Lectures which have been composed. It will treat, at large, and in an elementary manner, of the law of property, and of personal rights and commercial contracts; and will be prepared for the press in the course of the ensuing year, unless, in the mean time, there should be reason to apprehend that another volume would be trespassing too far upon the patience and indulgence of the public.

New York, November 23, 1826.

PREFACE

TO THE SECOND VOLUME.

WHEN the first volume of these Commentaries was published, it was hoped and expected that a second would be sufficient to include the remainder of the Lectures which had been delivered in Columbia College. But, in revising them for the press, some parts required to be suppressed, others to be considerably enlarged, and the arrangement of the whole to be altered and improved. A third volume has accordingly become requisite,[1] to embrace that remaining portion of the work which treats of commercial law, and of the doctrines of real estates, and the incorporeal rights and privileges incident to them.

It is probable that, in some instances, I may have been led into more detail than may be thought consistent with the plan of the publication. My apology is to be found in the difficulty of being really useful on some branches of the law, without going far into practical illustrations, and stating, as far as I was able, with precision and accuracy, the established distinctions. Such a detail, however, has been, and will hereafter be, avoided as much as possible; for the knowledge that is intended to be communicated in these volumes is believed to be, in most cases, of general application, and is of that elementary kind, which is not only essential to every person who pursues the science of the law as a practical profession, but is deemed useful and ornamental to gentlemen in

[1] This appeared in 1828, and a fourth volume was required, and appeared in 1830.

every pursuit, and especially to those who are to assume places of public trust, and to take a share in the business and in the councils of our country.

New York, November 17, 1827.

Note by the Author. — When the *N. Y. Revised Statutes* are cited in this work, the first edition, of 1829, is generally referred to; and if the last edition, of 1846, be referred to, it is cited as *New York Revised Statutes, 3d edition;* and if the citation of the *3d edition* be by the page, the reference is to the new paging at the top of each leaf. Whenever I have had occasion to refer, in this new edition of the Commentaries, to any of the New York statutes, I have always cited from the 3d edition; but, in other respects, the reference to the 1st edition of the New York Revised Statutes remains undisturbed; and I have not thought it worth the trouble of altering that reference, inasmuch as the paging to the first edition of the statutes is preserved in the margin to the 3d edition.

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TO THE TENTH EDITION.

In preparing this edition of the Commentaries, the main object has been to present the law as it now exists. Accordingly, all accessible statutes and reports, both English and American, have been examined, and care has been taken not to overlook any statute or decision which has either modified the force, or varied the application of the principles stated in the text. The text and Author's notes have not been touched, except to correct some slight verbal inaccuracies which had evidently crept into them. All the new, and a large number of the old citations, have been verified. In some instances, the notes added since the Author's death have been omitted, where time and change rendered them superfluous.

The admirable manner in which the last edition was edited rendered the task of preparing the present edition comparatively easy; but the field of the Commentaries is so extensive, and reports and statute books multiply so fast, that the labor has not been inconsiderable. It is hoped that the result may, in the words of Bacon, "yield use and profit to the students and professors of our laws."

It is proper to state that the larger portion of the new matter has been added by Mr. Forman.

Valuable assistance has been rendered, in preparing part of the fourth volume, by Mr. Washington R. Nichols, of the New York Bar.

RICHARD A. McCURDY.
WM. HENRY FORMAN.

New York, August 1, 1860.

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PART I.

OF THE LAW OF NATIONS.

LECTURE I.

OF THE FOUNDATION AND HISTORY OF THE LAW OF NATIONS.

When the United States ceased to be a part of the British empire, and assumed the character of an independent nation, they became subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe, as their public law. During the war of the American revolution, congress claimed cognizance of all matters arising upon the law of nations, and they professed obedience to that law, "according to the general usages of Europe." (*a*) By this law we are to understand that code of public instruction, which defines the rights and prescribes the duties of nations, in their intercourse with each other. The faithful observance of this law is essential to national character, and to the happiness of mankind. According to the observation of Montesquieu, (*b*) it is founded on the principle, that different nations ought to do each other as much good in peace, and as * little harm in war, as possible, without injury *2
to their true interests. But as the precepts of this code are not defined in every case with perfect precision, and as nations have no common civil tribunal to resort to for the interpretation and execution of this law, it is often very difficult to ascertain, to

(*a*) Ordinance of the 4th December, 1781, relative to maritime captures. Journals of Congress, vol. vii. 185. The English judges have frequently declared that the law of nations was part of the common law of England. Triquet *v.* Bath, 3 Burr. 1478; Heathfield *v.* Chilton, 4 Ib. 2015; and it is well settled that the common law of England, so far as it may be consistent with the constitutions of this country, and remains unaltered by statute, is an essential part of American jurisprudence. See post, pp. 342, 472, 473.

(*b*) L'Esprit des Loix, b. 1, c. 3.

the satisfaction of the parties concerned, its precise injunctions and extent; and a still greater difficulty is the want of adequate pacific means to secure obedience to its dictates.

Natural and positive Law of Nations.

There has been a difference of opinion among writers, concerning the foundation of the law of nations. It has been considered by some as a mere system of positive institutions, founded upon consent and usage; while others have insisted that it was essentially the same as the law of nature, applied to the conduct of nations, in the character of moral persons, susceptible of obligations and laws. We are not to adopt either of these theories as exclusively true. The most useful and practical part of the law of nations is, no doubt, instituted or positive law, founded on usage, consent, and agreement. But it would be improper to separate this law entirely from natural jurisprudence, and not to consider it as deriving much of its force and dignity from the same principles of right reason, the same views of the nature and constitution of man, and the same sanction of Divine revelation, as those from which the science of morality is deduced. There is a natural and a positive law of nations. By the former, every state, in its relations with other states, is bound to conduct itself with justice, good faith, and benevolence; and this application of the law of nature has been called by Vattel the necessary law of nations, because nations are bound by the law of nature to observe it; and it is termed by others the internal law of nations, because it is obligatory upon them in point of conscience. (*a*)

Moral obligation of States.

We ought not, therefore, to separate the science of public law from that of ethics, nor encourage the dangerous * suggestion, that governments are not so strictly bound by the obligations of truth, justice, and humanity, in relation to other powers, as they are in the management of their own local

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(*a*) Vattel, Prelim. sec. 7. *Omni autem in re consensio omnium gentium lex naturæ putanda est.* Cic. Tusc. Disp. 1, 13. Heineccius, in his Elementa Juris Naturæ et Gentium, b. 1, c. 1 and 3, (and which is very excellent as to the first branch of the subject,) and all the other great masters of ethical and national jurisprudence, place the foundation of the law of nature in the will of God, discoverable by right reason, and aided by Divine revelation; and its principles, when applicable, apply with equal obligation to individuals and to nations. A recent French writer (M. Victor Foucher) divides the law of nations into two branches. (1.) *Public* international law, which regulates the political relation of nation to nation; and (2.) *Private* international law, which, though based upon the first, regulates the reciprocal and personal relations of the inhabitants of different states. See Roman Law by Lord Mackenzie (ed. 1862), 52, 53, 54.

concerns. States, or bodies politic, are to be considered as moral persons, having a public will, capable and free to do right and wrong, inasmuch as they are collections of individuals, each of whom carries with him into the service of the community the same binding law of morality and religion which ought to control his conduct in private life. (*a*) The law of nations is a complex system, composed of various ingredients. It consists of general principles of right and justice, equally suitable to the government of individuals in a state of natural equality, and to the relations and conduct of nations; of a collection of usages, customs, and opinions, the growth of civilization and commerce; and of a code of conventional or positive law. (*b*) In the absence of these latter regulations, the intercourse and conduct of nations are to be governed by principles fairly to be deduced from the rights and duties of nations, and the nature of moral obligation; and we have the authority of the lawyers of antiquity, and of some of the first masters in the modern school of public law, for placing the moral obligation of nations and of individuals on similar grounds, and for considering individual and national morality as parts of one and the same science. (*c*)

The law of nations, so far as it is founded on the principles of natural law, is equally binding in every age, and upon all mankind. But the Christian nations of Europe, and their descendants on this side of the Atlantic, by the vast superiority of their attainments in arts, and science, and commerce, as well as in policy and government; and, above all, by the brighter light, the more certain truths, and the more definite sanction which Christianity has communicated to the ethical jurisprudence of the ancients, have

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(*a*) Dr. Francis Lieber, in his Manual of Political Ethics, 2 vols., Boston, 1838, has shown with great force, and by the most striking and apposite illustrations, the original connection between right and morality, and the reason and necessity of the application of the principles of ethics to the science of politics and the administration of government. The work is excellent in its doctrines, and it is enriched with various and profound erudition.

(*b*) 2 Mason C. C. 448, Story J.

(*c*) A writer in the Edinburgh Review for April, 1843, considers the elements of which the law of nations is composed, as consisting (1.) of *international morality*, being the rules commanded by the Deity, and which may be called the divine or natural law of nations; (2.) of *international law*, being rules of conduct sanctioned by the public opinion and usages of civilized nations, and which may be called the human, the actual, the received, or the positive law of nations. The one treats the law of nations as a science, and the other as a system of positive rules.

established a law of nations peculiar to themselves. They
*4 *form together a community of nations united by religion, manners, morals, humanity, and science, and united also by the mutual advantages of commercial intercourse, by the habit of forming alliances and treaties with each other, of interchanging ambassadors, and of studying and recognizing the same writers and systems of public law. (a)

After devoting the present lecture to a cursory view of the history of the law of nations, I shall enter upon the examination of the European and American code of international law, and endeavor to collect, with accuracy, its leading principles, and to discuss its practical details.

Law of Nations in ancient Greece.

The law of nations, as understood by the European world, and by us, is the offspring of modern times. The most refined states among the ancients seem to have had no conception of the moral obligations of justice and humanity between nations, and there was no such thing in existence as the science of international law. They regarded strangers and enemies as nearly synonymous, and considered foreign persons and property as lawful prize. Their laws of war and peace were barbarous and deplorable. So little were mankind accustomed to regard the rights of persons or property, or to perceive the value and beauty of public order, that in the most enlightened ages of the Grecian republics, piracy was regarded as an honorable employment. There were powerful Grecian states that avowed the practice of piracy; and the fleets of Athens, the best disciplined and most respectable naval force in all antiquity, were exceedingly addicted to piratical excursions. It was the received opinion, that Greeks, even as between their own cities and states, were bound to no duties, nor by any moral law, without compact; and that

(a) The law of nature, by the obligations of which individuals and states are bound, is identical with the will of God, and that will is ascertained, says Mr. Manning, either by consulting Divine revelation, where that is declaratory, or by the application of human reason, where revelation is silent. Christianity, in the words of Butler, "is an authoritative publication of natural religion," and it is from the sanction which revelation gives to natural law, that we must expect the gradual increase of the respect paid to justice between nations. Christianity reveals to us a general system of morality, but the application to the details of practice is left to be discovered by human reason. See Commentaries on the Law of Nations, by Wm. Oke Manning, Esq., London, 1839, b. 2, c. 1. This work is the first English treatise which I have seen, containing a regular and didactic discussion of the science, and it is a work of great excellence; and I beg leave to recommend it strongly to the attention of the American student.

prisoners taken in war had no rights, and might lawfully be put to death, or sold into perpetual slavery, with their wives and children. (*b*)

* There were, however, many feeble efforts, and some suc- *5
cessful examples, to be met with in Grecian history, in favor of national justice. The object of the Amphictyonic council was to institute a law of nations among the Greeks, and settle contests between Grecian states by a pacific adjustment. It was also a law of nations among them, and one which was very religiously observed, to allow to the vanquished the privilege of burying their own dead, and to grant the requisite truce for that purpose. Some of these states had public ministers resident at the courts of others, (*a*) and there were some distinguished instances of great humanity shown to prisoners of war. During a cessation of arms in the course of the Peloponnesian war, Athens and Sparta agreed to an exchange or mutual surrender of prisoners. (*b*) The sound judgment and profound reflections of Aristotle, naturally raised his sense of right above the atrocious maxims and practices of his age, and he perceived the injustice of that doctrine of Grecian policy, that, by the laws of war, the vanquished became the absolute property of the victor. "Wise men," he observed, "entertained different opinions upon that subject. Some considered superiority as a proof of virtue, because it is its natural effect, and they asserted it to be just that the victors should be masters of the vanquished; whilst others denied the force of the argument, and maintained that nothing could be truly just which was inconsistent with humanity." (*c*) He then proceeded to weaken by argument the false foundations on which the law of slavery, by means of capture in war, was established; and though he does not write on the subject very distinctly or forcibly, it seems to be quite apparent that his convictions were against the law.

The Romans exhibited much stronger proofs than the Greeks of

(*b*) Thucydides, b. 1, sec. 5. Mitford's History of Greece, 8vo. edit. vol. ii. 352, vol. vi. 107, 135, *et passim*. Isocrates, Orat. Panathe. Opera, edit. Wolfius, p. 635. — *Barbari natura essent hostes*. Ward's Inquiry into the History of the Law of Nations, vol. i. 177–183. Goguet's Origine des Loix, &c., part 2, b. 5. Grotius, b. 3, c. 7. Justin's Hist. 1, 43, c. 3; *Latrocinium maris gloriosum habebatur*. Potter's Antiquities of Greece, b. 3, c. 10 and 12, b. 4, c. 21.

(*a*) Mitford's History, vol. v. 378, 379.

(*b*) Thucyd. 1, 5, c. 18.

(*c*) Gillies's Aristotle's Politics, vol. ii. 35, 36.

In ancient Rome.

the influence of regular law, and there was a marked difference between those nations in their intercourse
*6 * with foreign powers. It was a principle of the Roman government, that none but a sworn soldier could lawfully fight the enemy; and in many instances the Romans showed that they excelled the Greeks, by the observance of better principles in their relations with other nations. The institution of a college of heralds or priests, charged with the fecial law relating to declarations of war and treaties of peace, was evidence of a people considerably advanced in the cultivation of the law of nations as a science; (*a*) and yet with what little attention *they* were accustomed to listen to the voice of justice and humanity, appears but too plainly in their haughty triumphs, their cunning interpretation of treaties, their continual violation of justice, their cruel rules of war, and the whole series of their wonderful successes, in the steady progress of the conquest of the world. The perusal of Livy's magnificent history of the rise and progress of the Roman power, excites our constant admiration of the vigor, the skill, the valor, and the fortitude of the Roman people; yet, notwithstanding the splendor of the story, and the attractive simplicity of the writer, no reader of taste and principle can well avoid feeling a thorough detestation of the fierce spirit of conquest which it displays, and of the barbarous international law and customs of the ancients.

A purer system of public morals was cultivated, and insensibly gained ground, in the Roman state. The cruelties of Marius in the Jugurthan war, when he put part of the inhabitants of a Numidian town to the sword, and sold the rest for slaves, were declared by Sallust (*b*) to be a proceeding *contra jus belli*. At the zenith of the Roman power, the enlarged and philosophical mind of Cicero was struck with extreme disgust at the excesses in which his countrymen indulged their military spirit. He justly discerned that mankind were not intended, by the law and constitution of their nature, as rational and social beings, to live in eternal enmity with each other; and he recommends, in one of the most

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(*a*) Livy, b. 1, c. 32. Ib. b. 9, c. 5. Ib. 36, c. 3. Cicero de Off. 1, 11. The *collegium feciulium* was instituted, according to legendary story, as early as the reign of Numa Pompilius, and the efficacy of that institution on the rights of war is declared by Cicero, — *belli æquitas sanctissime feciali populi Romani jure prescripta est.*

(*b*) Sal. Jug. c. 91.

beautiful and perfect ethical codes to be met with *among the * 7
remains of the ancients, the virtues of humanity, liberality, and justice towards other people, as being founded in the universal law of nature. Their ancestors, he observed, applied the term enemy to that man whom they regarded merely as a foreigner; but to deny to strangers the use and protection of the city, would be inhuman. To overturn justice by plundering others, tended to destroy civil society, as well as violate the law of nature and the institutions of Heaven; and by some of the most happy illustrations and pathetic examples, Cicero vindicated the truth, and inculcated the value of the precept, that nothing was truly useful which was not honest. (*a*) In the latter ages of the Roman empire, when their municipal law became highly cultivated, and adorned by philosophy and science, the law of nations was recognized as part of the natural reason of mankind. *Quod vero naturalis ratio inter omnes homines constituit, id apud omnes gentes perœque custoditur, vocaturque jus gentium, quasi quo jure omnes gentes utuntur.* (*b*) The Roman law was destined to obtain the honorable distinction of becoming a national guide to future ages, and to be appealed to by modern tribunals and writers, in cases in which usage and positive law are silent, as one authoritative evidence of the decisions of the law of nations.

It must be admitted, however, that the sages from whose works the Pandects were compiled, speak very indistinctly and imperfectly on the subject of national law. They must be read with much discrimination, as Grotius observed, (*c*) for they often call *that* the law of nations which prevailed, and perhaps by casual consent, among some nations only; and many things which belonged to the law of nations they treated indiscriminately with matters of mere municipal law. The Roman jurisprudence, in its most cultivated state, was a very imperfect transcript of the precepts of natural *justice on the subject of national duty. It retained * 8
strong traces of ancient rudeness, from the want of the Christian system of morals, and the civilizing restraints of commerce. We find the barbarous doctrine still asserted, that prisoners of war became slaves *jure gentium;* (*a*) and even in respect to foreign na-

(*a*) Off. b. 1, sec. 12; b. 3, sec. 5, 6, 7, 11. De Legibus, b. 1.
(*b*) Dig. 1, 1, 9. Inst. 1, 2, 1.
(*c*) Proleg. sec. 53.
(*a*) Inst. 1, 3, 4; Dig. lib. 1, tit. 5, sec. 5, and lib. 49, tit. 15, c. 12, sec. 1.

tions with whom the Romans were at peace, but had no particular alliance, it is laid down in the digests, that whoever passed from one country to the other became immediately a slave. *Nam si cum gente aliqua neque amicitiam, neque hospitium, neque fœdus amicitiæ causa factum habemus, hi hostes quidem non sunt: quod autem ex nostro ad eos pervenit, illorum fit: et liber homo noster ab eis captus, servus fit et eorum. Idemque est, si ab illis ad nos aliquid perveniat.* (*b*) It is impossible to conceive of a rule of national law more directly calculated to destroy all commercial intercourse, and to maintain eternal enmity between nations.

Law of Nations in the Middle Ages.

The irruption of the northern tribes of Scythia and Germany overturned all that was gained by the Roman law, annihilated every restraint, and all sense of obligation; and civil society relapsed into the violence and confusion of the barbarous ages. Mankind seemed to be doomed to live once more in constant distrust or hostility, and to regard a stranger and an enemy as almost the same. Piracy, rapine, and ferocious warfare deformed the annals of Europe. The manners of nations were barbarous, and their maxims of war cruel. Slavery was considered as a lawful consequence of captivity. Mr. Barrington (*c*) has, indeed, cited the laws of the Visigoths, Saxons, Sicilians, and Bavarians, as restraining, by the severest penalties, the plunder of shipwrecked goods, and the abuse of shipwrecked seamen, and as extending the rights of hospitality to strangers. But notwith-
* 9 standing *a few efforts of this kind to introduce order and justice, and though municipal law had undergone great improvement, the law of nations remained in a rude and uncultivated state, down to the period of the 16th century. In many instances, shipwrecked strangers were made prisoners, and sold as slaves, without exciting any complaint, or offending any public sense of justice. Numerous cases occurred of acts of the greatest perfidy and cruelty towards strangers and enemies. Prisoners were put to death for their gallantry and brave defence in war. There was no reliance upon the word and honor of men in power. Reprisals and private war were in constant activity. Instances were frequent of the violation of embassies, of the murder of hostages, the imprisonment of guests, and the killing of heralds. The victor in war had his option in dealing with his prisoners, either to put them to death,

(*b*) Dig. 49, 15, 5, 2.

(*c*) Observations on the Statutes, chiefly the more ancient, p. 22.

or reduce them to slavery, or exact an exorbitant ransom for their deliverance. So late as the time of Cardinal Richelieu, it was held to be the right of all nations to arrest strangers who came into the country without a safe-conduct. (*a*)

The Emperor Charlemagne made distinguished efforts to improve the condition of Europe, by the introduction of order and the propagation of Christianity; and we have cheering examples, during the darkness of the middle ages, of some recognition of public law by means of alliances, and the submission of disputes to the arbitrament of a neutral power. Mr. Ward enumerates five institutions, existing about the period of the 11th century, which made a deep impression upon Europe, and contributed, in a very essential degree, to improve the law of nations. (*b*) These institutions were the feudal system, the concurrence of Europe in one form of religious worship and government, the *es- * 10
tablishment of chivalry, the negotiations and treaties forming the conventional law of Europe, and the settlement of a scale of political rank and precedency.

Of all these causes of reformation, the most weight is to be attributed to the intimate alliance of the great powers as one Christian community. Influence of Christianity. The influence of Christianity was very efficient towards the introduction of a better and more enlightened sense of right and justice among the governments of Europe. It taught the duty of benevolence to strangers, of humanity to the vanquished, of the obligation of good faith, and of the sin of murder, revenge, and rapacity. The history of Europe, during the early periods of modern history, abounds with interesting and strong cases, to show the authority of the Church over turbulent princes and fierce warriors, and the effect of that authority in meliorating manners, checking violence, and introducing a system of morals, which inculcated peace, moderation, and justice. The Church had its councils or convocations of the clergy, which formed the nations professing Christianity into a connection resembling a federal alliance, and those councils sometimes settled the titles and claims of princes, and regulated the temporal affairs of the Christian powers. The confederacy of the Christian nations was bound together by a sense of common duty and interest in respect to the rest of mankind. It became a general prin-

(*a*) Ward's History of the Law of Nations, c. 7, 8, 9.
(*b*) Ib. vol. i. 322–328.

ciple of belief and action, that it was not only a right, but a duty, to reduce to obedience, for the sake of conversion, every people who professed a religious faith different from their own. To make war upon infidels was, for many ages, a conspicuous part of European public law; but this gross perversion of the doctrines and spirit of Christianity had at least one propitious effect upon the Christian powers, inasmuch as it led to the cultivation of peace and union between them, and to a more free and civilized intercourse. The notion that it was lawful to invade and subdue Mahometan and Pagan countries, continued very long to sway the minds of men; and it was not till after the age of Grotius
*11 and Bacon, that *this error was entirely eradicated. Lord Coke (*a*) held, that an alliance for mutual defence was unlawful between Christians and Turks; and Grotius was very cautious as to the admission of the lawfulness of alliances with infidels, and he had no doubt that all Christian nations were bound to assist one another against the attacks of infidels. (*b*) Even Lord Bacon (*c*) thought it a matter of so much doubt, as to propound it seriously as a question, whether a war with infidels was not first in order of dignity, and to be preferred to all other just temporal quarrels; and whether a war with infidels might not be undertaken merely for the propagation of the Christian faith, without other cause of hostility.

Of Chivalry.

The influence of chivalry was beneficial upon the laws of war. It introduced declarations of war by heralds; and to attack an enemy by surprise was deemed cowardly and dishonorable. It dictated humane treatment to the vanquished, cour-

(*a*) 4 Inst. 155.

(*b*) Grotius, b. 2, c. 15, sec. 11, 12. The university of Salamanca, as early as 1550, decided in favor of Las Casas upon the thesis maintained by Sepulveda, and refuted by Las Casas, that it was a right and duty to make war upon Pagans and Heretics, in order to propagate the true faith. But the minds of men in Catholic countries remained long unsettled on this point, and the doctrines of Sepulveda are said to have been sanctioned within the period of the last fifty years, by the Royal Academy of History at Madrid. (Dict. Hist. art. Sepulveda. Verplanck's Discourse before the New York Historical Society, 1818.) Even as late as 1718, the Emperor Charles VI. commissioned two ships of war to cruise "through any seas, far and wide, to follow and pursue any such as are the enemies of our august house, *but chiefly the enemies of the Christian name.*" The commission was dated at Vienna, July 16, 1718. But afterwards the commission was restricted by an additional instruction, dated at Brussels, 28th September, 1718, to war "against the Spaniards, but not against any other power, *though even enemies to the Christian name.*" See the commission at large in Callender's Voyages, vol. iii. 447, 450.

(*c*) Bacon's Works, vol. iii. 472, 492.

tesy to enemies, and the virtues of fidelity, honor, and magnanimity in every species of warfare.

Of the Civil Law.

The introduction and study of the civil law must also have contributed largely to more correct and liberal views of the rights and duties of nations. It was impossible that such a refined and wise system of municipal and ethical jurisprudence as the Roman law, could have been taught in universities and schools, and illustrated by a succession of eminent civilians, who were worthy of being associated with the Roman sages, without at the same time producing a great effect upon the public mind. This grand monument of the embodied wisdom of the ancients, when once known and examined, must have reflected a broad stream of light upon the feudal institutions and the public counsels of the European nations. We accordingly find that the rules of the civil law were applied to the government of national rights, and they have *contributed very materially to the erection of the * 12
modern international law of Europe. From the 13th to the 16th century, all controversies between nations were adjudged by the rules of the civil law.

Of Treaties.

Treaties, conventions, and commercial associations had a still more direct and visible influence in the formation of the great modern code of public law. They gave a new character to the law of nations, and rendered it more and more of a positive or instituted code. Commercial ordinances and conventions contributed greatly to improve and refine public law and the intercourse of nations, by protecting the persons and property of merchants in cases of shipwreck, and against piracy, and against seizure and arrest, upon the breaking out of war. Auxiliary treaties were tolerated, by which one nation was allowed to be an enemy to a certain extent only. Thus, if in time of peace, a defensive treaty had been made between one of the parties to a subsequent war and a third power, by which a certain number of troops were to be furnished in case of war, a compliance with this engagement implicated the auxiliary as a party to the war, *only so far* as her contingent was concerned. The nations of Europe had advanced to this extent in diplomatic science as early as the beginning of the 13th century, and such a refinement was totally unknown to the ancients. (*a*) Treaties of subsidy showed also the

(*a*) Under Henry III., in 1240, the Flemings obtained leave to carry on their trade as usual, when England and France were at war, so long as they took no other part

progress of the law of nations. The troops of one nation, to a definite extent, could be hired for the service of one of the belligerents, without affording ground for hostility with the community which supplied the specific aid. The rights of commerce began to be regarded as under the protection of the law of nations, and Queen Elizabeth complained of the Spaniards, that they had prohibited commerce in the Indian seas, contrary to that law.

Law concerning shipwrecks.

The efforts that were made, upon the revival of commerce, to suppress piracy, and protect shipwrecked property, show a returning sense of the value and of the obligations of national justice. The case of shipwrecks may be cited, and dwelt upon for a moment, as a particular and strong in-
*13 stance * of the feeble beginnings, the slow and interrupted progress, and final and triumphant success of the principles of public right. Valin (*a*) imputes the barbarous custom of plundering shipwrecked property, not merely to the ordinary cupidity for gain, but to a more particular and peculiar cause. The earliest navigators were almost all pirates, and the inhabitants of the coasts were constantly armed against their depredations, and whenever they had the misfortune to be shipwrecked, they were pursued with a vindictive spirit, and deemed just objects of punishment. The practice of plundering shipwrecks has been traced to the Rhodians, and from them it passed to the Romans; and the efforts to restrain it were very feeble and gradual, and mixed with much positive injustice. The goods cast ashore first belonged to the fortunate occupant, and then they were considered as belonging to the state. This change from private to public appropriation of the property, rendered a returning sense of right and duty more natural and easy. The Emperors Hadrian and Antoninus had the honor of having first renounced the claim to shipwrecked property in favor of the rightful owner. (*b*) But the inhuman customs on this subject were too deeply rooted to be eradicated by the wisdom and vigilance of the Roman lawgivers. The laws in favor of the unfortunate were disregarded by succeeding emperors, and when the empire itself was overturned by the northern barbarians, the

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in the war than what their earl, under his feudal relation to the crown of France, was called upon by reason of his homage to perform. Southey's Early Naval History of England, vol. i. 180.

(*a*) Com. Sur. Ord. tom. ii. 579–587.

(*b*) Vinnius in Inst. lib. 2, tit. 1, art. 47, note 5. Valin, *ub. sup.*

laws of humanity were swept away in the tempest; and the continual depredations of the Saxons and Normans induced the inhabitants of the western coasts of Europe to treat all navigators, who were thrown by the perils of the sea upon their shores, as pirates, and to punish them as such, without inquiry or discrimination.

The Emperor Andronicus Comnenus, who reigned at Constantinople in 1183, made great efforts to repress this inhuman practice. His edict was worthy of the highest * praise, but *14 it ceased to be put in execution after his death. Pillage had become an inveterate moral pestilence. It required something more effectual than papal bulls, and the excommunication of the church, to stop the evil. The revival of commerce, and with it a sense of the value of order, commercial ordinances, particular conventions and treaties between sovereigns, contributed gradually to suppress this criminal practice, by rendering the regulations on that subject a branch of the public law of nations. Valin says, it was reserved for the ordinances of Louis XIV. to put the finishing stroke to this species of piracy, by declaring that shipwrecked persons and property were placed under the special protection and safeguard of the crown; and the punishment of death, without hope of pardon, was pronounced against the guilty. (*a*) [1]

Treatment of prisoners.

The progress of moderation and humanity in the treatment of prisoners, is to be imputed to the influence of

(*a*) The sense of justice, in respect to shipwrecks and piracy, has made its way into the kingdom of Siam, in Eastern India; and by a treaty with the United States, in April, 1836, persons and property in American vessels, suffering shipwreck in the Siamese dominions, or taken by pirates and brought therein, are to be carefully protected, preserved, and restored.[2] By the treaty of commerce and navigation between the United States and Hanover, May 20, 1840, art. 8, assistance is to be given to the shipwrecked and stranded vessels, and no more than the ordinary salvage or duties, on unlading the cargo for repairs in such cases, shall be demanded. The treaty likewise specially declares, "that the ancient and barbarous right to wrecks of the sea shall be entirely abolished, with respect to the property of the subjects or citizens of the contracting parties." Such a stipulation between two civilized and Christian nations, near the middle of the 19th century, sounds oddly, and might as well have been spared.

[1] Principles of enlightened justice and generous policy were applied to the interpretation of the Revenue Laws of the United States, in a late case of shipwreck. It was held that goods, taken from a British vessel wrecked on our coast, and landed and sold without a permit therefor, were not forfeited to the United States. The Gertrude, 3 Story C. C. 68.

[2] Similar stipulations are introduced into the treaties with Borneo and Lew Chew, 10 U. S. Stat. 909, 1101, and Japan, 11 U. S. Stat. 597.

Christianity, and of conventional law, establishing a general exchange of prisoners, rank for rank, and giving protection to cartel ships for that purpose. It is a practice of no very ancient introduction among the states of Europe, and it was not of very familiar use in the age of Grotius, and it succeeded the elder practice of ransom. From the extracts which Dr. Robinson (*b*) gives from Bellus, who was a judge or assessor in the armies of Charles V. and Philip II., he concludes that no practice so general and so favorable to the conduct of prisoners, as a public exchange in time of war, was known in the 16th century. (*c*) The private interest of the captor in his prisoner, and his right to claim ransom money, continued through that period; and the practice of ransom, founded on the right of property claimed by the captor, succeeded to the Greek and Roman practice of killing prisoners, or selling them as slaves.

Admission of Ambassadors.

The custom of admitting resident ministers at each sovereign's court, was another important improvement in the security and facility of national intercourse; (*d*) and this
*15 led * to the settlement of a great question, which was very frequently discussed in the 15th and 16th centuries, concerning the inviolability of ambassadors. It became at last a definitive principle of public law, that ambassadors were exempted from all local jurisdiction, civil and criminal; though Lord Coke considered the law in his day to be, that if an ambassador committed any crime which was not merely *malum prohibitum*, he lost his privilege and dignity as an ambassador, and might be punished

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(*b*) 3 Rob. Adm. Appendix A.

(*c*) When Sir Richard Hawkins, in his armed ship Dainty, was captured in the South Sea, after a desperate engagement, in 1594, the Spanish commander, Don Beltran, an officer of great gallantry, courtesy, and humanity, claimed, nevertheless, a property in his prisoner, and the right to a ransom. Callender's Voyages, vol. ii. 126, 134. The custom of enslaving prisoners of war was continued in Europe down to the 13th century, and was then extinguished, though asserted even by Grotius, De Jure Belli, lib. 3, c. 7, to be conformable to the law of nations. It was discontinued under the influence of Christianity, though the right to the ransom of prisoners as the subjects of property, was continued to a much later period.

(*d*) Ferdinand the Catholic is said to have introduced the practice of resident ministers. Prescott's Hist. of Ferdinand and Isabella, vol. i. 352. The right of sending public ministers to the confederate states, and to foreign states, is preserved to all the princes and states composing the present Germanic Confederation, (1844,) and so it is in that of the Swiss Cantons; but the privilege is wisely taken away from the several states by the Constitution of the United States of America.

as any other private alien, and that he was even bound to answer civilly for his contracts that were good, *jure gentium*. (*a*)

Thus stood the law of nations at the age of Grotius. It had been rescued, to a very considerable extent, from the cruel usages and practices of the barbarians. It had been restored to some degree of science and civility by the influence of Christianity, the study of the Roman law, and the spirit of commerce. It had grown in value and efficacy, from the intimate connection and constant intercourse of the modern nations of Europe, who were derived from a common origin, and were governed by similar institutions, manners, laws, and religion. But it was still in a state of extreme disorder, and its principles were little known, and less observed. It consisted of a series of undigested precedents, without order or authority. Grotius has, therefore, been justly considered as the father of the law of nations. He arose like a splendid luminary, dispelling darkness and confusion, and imparting light and security to the intercourse of nations. It is said by Barbeyrac, (*b*) that Lord Bacon's works first suggested to Grotius the idea of reducing the law of nations to the certainty and precision of a regular science. Grotius has himself fully explained the reasons which led him to undertake his necessary, and most useful and immortal work. (*c*) He found the sentiment universally prevalent, not only among the vulgar, but among men of reputed wisdom and learning, that war * was a stran- *16 ger to all justice, and that no commonwealth could be governed without injustice. The saying of Euphemus in Thucydides, he perceived to be in almost every one's mouth, that nothing which was useful was unjust. Many persons, who were friends to justice in private life, made no account of it in a whole nation, and did not consider it as applicable to rulers. He perceived a horrible licentiousness and cruelty in war, throughout the Christian world, of which barbarians might be ashamed. When men took up arms, there was no longer any reverence for law, either human or divine; and it seemed as if some malignant fury was sent forth into the world, with a general license for the commission of all manner of wickedness and crime. (*a*)

Grotius.

The object of Grotius was to correct these false theories and

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(*a*) 4 Inst. 153.
(*b*) Puff. sec. 29.
(*c*) Proleg. De Jur. Bel.
(*a*) Proleg. sec. 3 and 28.

pernicious maxims, by showing a community of sentiment among the wise and learned of all nations and ages, in favor of the natural law of morality. He likewise undertook to show that justice was of perpetual obligation, and essential to the well-being of every society, and that the great commonwealth of nations stood in need of law, and the observance of faith, and the practice of justice. His object was, to digest, in one systematic code, the principles of public right, and to supply authorities for almost every case in the conduct of nations; and he had the honor of reducing the law of nations to a system, and of producing a work which has been resorted to as the standard of authority in every succeeding age. The more it is studied, the more will our admiration be excited at the consummate execution of the plan, and the genius and erudition of the author. There was no system of the kind extant, that had been produced by the ancient philosophers of Greece, or by the primitive Christians. The work of Aristotle on the rights of war, and the writings of the Romans on their fecial law, had not survived the wreck of ancient literature; and the essays of some learned moderns on public law were
*17 *most imperfect, and exceedingly defective in illustrations from history, and in omitting to place their decisions upon the true foundations of equity and justice. (*a*) Grotius, therefore, went purposely into the details of history and the usages of nations, and he resorted to the works of philosophers, historians, orators, poets, civilians, and divines, for the materials out of which the science of public morality should be formed; proceeding on the principle, that when many men, at different times and places, unanimously affirmed the same thing for truth, it ought to be ascribed to some universal cause. (*b*) His unsparing citation of authorities, in support of what the present age may consider very plain and undisputed truths, has been censured by many persons as detracting from the value of the work. On the other hand, the support that he gave to those truths, by the concurrent testimony of all nations and ages, has been justly supposed to contribute to that reverence for the principles of international justice, which has since distinguished the European nations.

Among the disciples of Grotius, Puffendorf has always held the

(*a*) Proleg. of Grot. sec. 36, 37, 38.

(*b*) *Omni autem in re consensio omnium gentium lex natura putanda est.* Cic. Tuscul. Quæst. lib. 1, c. 13.

first rank. His work went more at large into the principles of natural law, and combined the science of ethics with what may be more strictly called the law of nations. It is copious in detail, but of very little practical value in teaching us what the law of nations is at this day. It is rather a treatise on moral philosophy than on international law; and the same thing may be said of the works of Wolfius, Burlamaqui, and Rutherforth. The summary of the law of nations, by Professor Martens, is a treatise of greater practical utility, but it is only a very partial view of the system, being confined to the customary and conventional law of the modern nations of Europe. (*c*) Bynkershoek's treatise on the laws of war has been received as of great authority on that particular branch of the science of the law of nations, and the subject is by him ably and copiously *discussed. The work is replete with *18 practical illustration, though too exclusive in its references to the ordinances of his own country, to render his authority very unquestionable. The most popular, and the most elegant writer on the law of nations, is Vattel, whose method has been greatly admired. He professed to have followed the voluminous work of Wolff on the Law of Nature and Nations, and to be enlightened and guided by his learning, with much improvement upon the doctrine and arrangement of his great master. He has been cited, for the last half century, more freely than any one of the public jurists; but he is very deficient in philosophical precision. His topics are loosely, and often tediously and diffusively discussed, and he is not sufficiently supported by the authority of precedents, which constitute the foundation of the positive law of nations. There is no work which combines, in just proportions, and with entire satisfaction, an accurate and comprehensive view of the necessary and of the instituted law of nations, and in which principles are sufficiently supported by argument, authority, and example. Since the age of Grotius, the code of war has been vastly enlarged and improved, and its rights better defined, and its severities greatly mitigated. The rights of maritime capture, the principles of the law of prize, and the duties and privileges of neu-

Puffendorf.

Martens.

Bynkershoek.

Vattel.

(*c*) Wheaton, in his History of the Law of Nations, edit. N. Y. 1845, says that the treatise of Martens, of which a third edition in French appeared in 1821, Précis du Droit des Gens Modernes de l'Europe fondé sur les Traités et l'Usage, has become a justly esteemed manual of the science.

Modern improvements in the Law of Nations.

trals, have grown into very important titles in the system of national law. We now appeal to more accurate, more authentic, more precise, and more commanding evidence of the rules of public law, by a reference to the decisions of those tribunals, to whom, in every country, the administration of that branch of jurisprudence is specially intrusted. We likewise appeal to the official documents and ordinances of particular states, which have professed to reduce into a systematic code, for the direction of their own tribunals, and for the information of foreign powers, the law of nations, on those points which relate particularly to the rights of commerce and the duties of neutrality. But in the absence of higher and more authoritative sanctions, the ordinances of foreign states, the opinions of eminent statesmen, and the writings of distinguished jurists, are regarded as of great consideration on questions not settled by conventional law. In cases where the principal jurists agree, the presumption will
* 19 be very great in favor of the solidity of their * maxims; and no civilized nation, that does not arrogantly set all ordinary law and justice at defiance, will venture to disregard the uniform sense of the established writers on international law. England and the United States have been equally disposed to acknowledge the authority of the works of jurists, writing professedly on public law, and the binding force of the general usage and practice of nations, and the still greater respect due to judicial decisions recognizing and enforcing the law of nations. In all our foreign negotiations and domestic discussions of questions of national law, we have paid the most implicit respect to the practice of Europe, and the opinions of her most distinguished civilians. In England, the report made in 1753, to the king, in answer to the Prussian memorial, is very satisfactory evidence of the obedience shown to the great standing authorities on the law of nations, to which I have alluded. And in a case which came before Lord Mansfield, in 1764, in the K. B., (*a*) he referred to a decision of Lord Talbot, who had declared that the law of nations was to be collected from the practice of different nations, and the authority of writers; and who had argued from such authorities as Grotius, Barbeyrac, Bynkershoek, Wicquefort, &c., in a case where British authority was silent. The most celebrated collections and codes of maritime

(*a*) Triquet *v.* Bath, 3 Burr. 1478.

law, such as the *Consolato del Mare*, the laws of Oleron, the laws of the Hanseatic league, and, above all, the marine ordinances of Louis XIV., are also referred to, as containing the most authentic evidence of the immemorial and customary law of Europe.

The dignity and importance of this branch of jurisprudence, cannot fail to recommend it to the deep attention of the student; and a thorough knowledge of its principles is necessary to lawyers and statesmen, and highly ornamental to every scholar who wishes to be adorned with the accomplishments of various learning. Many questions arise in the course of commercial transactions, which require for * their solution * 20 an accurate acquaintance with the conventional law of Europe, and the general doctrines of the prize tribunals. Though we may remain in peace, there is always war raging in some part of the globe, and we have at the present moment (*a*) neutral rights to exact, and neutral duties to perform, in the course of our Mediterranean trade, and in the trade to the Brazils, and along the shores of the Pacific. A comprehensive and scientific knowledge of international law is highly necessary, not only to lawyers practising in our commercial ports, but to every gentleman who is animated by liberal views, and a generous ambition to assume stations of high public trust. It would be exceedingly to the discredit of any person who should be called to take a share in the councils of the nation, if he should be found deficient in the great leading principles of this law; and I think I cannot be mistaken in considering the elementary learning of the law of nations, as not only an essential part of the education of an American lawyer, but as proper to be academically taught. My object, therefore, in some succeeding lectures will be, to discuss all the leading points arising upon the rights and duties of nations, in the several relations of peace, of war, and of neutrality.

Importance of the study.

(*a*) November, 1824.

*21 *LECTURE II.

OF THE RIGHTS AND DUTIES OF NATIONS IN A STATE OF PEACE.

A VIEW of the rights and duties of nations in peace, will lead us to examine the grounds of national independence, the extent of territorial jurisdiction, the rights of embassy and of commercial intercourse.

Equality and independence of nations.

Nations are equal in respect to each other, and entitled to claim equal consideration for their rights, whatever may be their relative dimensions or strength, or however greatly they may differ in government, religion, or manners. This perfect equality, and entire independence of all distinct states, is a fundamental principle of public law. It is a necessary consequence of this equality, that each nation has a right to govern itself as it may think proper, and no one nation is entitled to dictate a form of government, or religion, or a course of internal policy, to another. No state is entitled to take cognizance or notice of the domestic administration of another state, or of what passes within it as between the government and its own subjects. (*a*) The Spaniards, as Vattel observes, violated all rules of right, when

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(*a*) Grotius, de Jure belli et pacis, b. 1, c. 3, sec. 8; Vattel, Droit des Gens, b. 2, c. 4, sec. 54; Rutherforth's Inst. b. 2, c. 9. The principle of non-interference with the internal policy and government of other states, was emphatically declared by England and France in the autumn of 1830, and new strength and solidity were thereby given to national freedom and independence. But the right of intervention exists when impending danger requires it, as when it is necessary to prevent aggression by preventing the dangerous accumulation of the means of attack. An interference to preserve the balance of power among neighboring nations, is another case of the utmost moment and difficulty, and requires the most grave and comprehensive consideration. Such intervention has, within the last two centuries, been very frequent, and led to extensive and destructive wars. But it was necessary and just in some of the instances, and pre-eminently so with England, in 1803, and with Austria in 1813, under the dangerous preponderance and inveterate aggressions of France. "No governments," said General Washington, (Sparks's Writings of Washington, vol. xi. p. 382,) "ought to interfere with the internal concerns of another, *except for the security of what is due to themselves.*" War may be engaged in, in behalf of our neighbors, if it be very certain that we must suffer by their ruin. *Tua res agitur, paries quum proximus ardet.* Heinecc. Elem. Jur. Nat. et Gent. b. 2, c. 9, sec. 107. See Roman Law by Lord Mackenzie, (ed. 1862) 54, 55.

they set up a tribunal of their own to judge the Inca of Peru according to their laws. If he had broken the law of nations
* in respect to them, they would have had a right to punish * 22
him; but when they undertook to judge of the merits of his own interior administration, and to try and punish him for acts committed in the course of it, they were guilty of the grossest injustice. No nation had a contention with itself, but the ancient Romans, with their usual insolence, immediately interfered, and with profound duplicity pretended to take part with the oppressed for the sake of justice, though in reality for the purpose of dominion. It was by a violation of the right of national independence, that they artfully dissolved the Achæan league, and decreed that each member of the confederacy should be governed by its own laws, independent of the general authority. (*a*) But so surprisingly loose and inaccurate were the theories of the ancients on the subject of national independence, that the Greeks seem never to have questioned the right of one state to interfere in the internal concerns of another. (*b*) We have several instances within time of memory, of unwarrantable and flagrant violations of the independence of nations. The interference of Russia, Prussia, and Austria, in the internal government of Poland, and first dismembering it of large portions of its territory, and then finally overturning its constitution, and destroying its existence as an independent power, was an aggravated abuse of national right. There were several cases which preceded, or which arose during the violence of the French revolution, which were unjustifiable invasions of the rights of independent nations to prescribe their own forms of government, and to deal in their discretion with their own domestic concerns. Among other instances, we may refer to the invasion of Holland by the Prussian arms in 1787, and of France by the Prussian arms in 1792, and of wars fomented or declared against all monarchical forms of government, by the French
rulers, during * the early and more intemperate stages of * 23
their revolution. We may cite also the invasion of Naples by Austria in 1821, and the invasion of Spain by France in 1823, under the pretext of putting down a dangerous spirit of internal

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(*a*) Livy, b. 33, c. 30; Florus, b. 2, c. 7; Montesq. Consid. sur les Causes de la Grand. des. Rom. c. 6.

(*b*) Mitford's Hist. of Greece, vol. v. 127.

revolution and reform, as instances of the same violation of the absolute equality and independence of nations. (*a*)

Rule of interference.

Every nation has an undoubted right to provide for its own safety, and to take due precaution against distant as well as impending danger. The right of self-preservation is paramount to all other considerations. (*b*) A rational fear of an imminent danger is said to be a justifiable cause of war. *Posse vicinum impediri, ne in suo solo, sine alia causa suaque evidenti utilitate, munimentum nobis propinquum extruat, aut aliud quid faciat,*

(*a*) The British government declined being a party to the promulgated doctrines and proceedings of the congress of the great powers of continental Europe at Troppau and Laybach, in 1821, and at Verona, in 1822, and which gave sanction to the invasions of Naples and Spain. It was not supposed by Great Britain that there existed in either of those instances, a case of such direct and imminent danger to the safety of other states, as to warrant, upon principles of international law, a forcible interference. The allied sovereigns who assembled at Laybach and Verona, do not appear to have differed essentially with Great Britain, as to the general principles which ought to regulate the interference of other states in the internal affairs of Naples and Spain, but they differed in the application of those principles to the cases before them. They justified their interference on the ground that it was "necessary for protecting Italy from a general insurrection, and the neighboring states from the most imminent dangers," — "that there existed a vast conspiracy against all established power and against all those rights consecrated by that social order under which Europe had enjoyed so many centuries of glory and happiness." — "That, in respecting the rights and independence of all legitimate power, they regarded as disavowed by the principles which constitute the public right of Europe, all pretended reform operated by revolt and open hostility." Their object was to protect the peace of Europe "against those disastrous attempt which would spread the horror of universal anarchy over the civilized world" — "against a fanaticism for innovation, which would soon have rendered the existence of any public order whatever, problematical." — "That they were far from wishing to prolong this interference beyond the limits of strict necessity, and would ever prescribe to themselves the preservation of the independence and of the rights of each state." Circular Despatch and Declaration of the Sovereigns of Austria, Russia, and Prussia; Laybach, May, 1821; Annual Register for 1821, p. 599. The quadruple alliance in 1834, between France, Spain, Great Britain, and Portugal, was made for the purpose of putting an end to a war in regard to the succession to the crown of Portugal, waged between the Emperor Don Pedro, contending for the rights of the Queen of Portugal, Donna Maria 2d, and the Infante Don Miguel, who had usurped the throne, and also, for the purpose of expelling from the Peninsula the Infante Don Carlos, who disputed with Queen Isabella 2d the succession to the crown of Spain, and is another instance of interference with the internal concerns of nations. The object of the interference and quadruple alliance was effected by the expulsion of the two Infantes. So far, the armed interference in this case went on the momentous questions of dynasty and succession, and on the pretence of putting an end to a destructive and interminable civil war. See Roman Law by Lord Mackenzie, (ed. 1862,) 55; Lord Palmerston's Despatch, 5th April, 1847 — Parliamentary Papers.

(*b*) Vattel, b. 2, c. 4, sec. 49, 50; Kluber, Droit des Gens, c. 1, p. 75; Grotius, b. 2, c. 1. See Despatch of Mr. Seward to Lord Lyons on the "Trent" affair, 1862.

unde justa formido periculi oriatur. (*c*) The danger must be great, distinct, and imminent, and not rest on vague and uncertain suspicion. The British government officially declared to the allied powers in 1821, (*d*) that no government was more prepared than their own, "to uphold the right of any state or states to interfere, where their own security or essential interests were seriously endangered by the internal transactions of another state; — that the assumption of the right was only to be justified by the strongest necessity, and to be limited and regulated thereby; — that it could not receive a general and indiscriminate application to all revolutionary movements, without reference to their immediate bearing upon some particular state or states; — that its exercise was an exception to general principles of the greatest value and importance, and as one that only properly grows out of the circumstances of the special case; and exceptions of this description could never, without the utmost danger, be so far reduced to rule, as to be incorporated into the ordinary diplomacy of states, or into the institutes of the law of nations. *The limitation to the right of interference *24 with the internal concerns of other states, was defined in this instance with uncommon precision; and no form of civil government which a nation may think proper to prescribe for itself, can be admitted to create a case of necessity justifying an interference by force; for a nation under any form of civil policy which it may choose to adopt, is competent to preserve its faith, and to maintain the relations of peace and amity with other powers.

Assistance in case of revolt.

It is sometimes a very grave question, when and how far one nation has a right to assist the subjects of another, who have revolted, and implored that assistance. It is said (*a*) that assistance

(*c*) Huber de Jure civitatis, lib. 3, c. 7, sec. 4.

(*d*) Lord Castlereagh's Circular Despatch of January 19, 1821, and of May, 1823. Annual Register, vol. lxv. Public Documents. See, also, Mr. Secretary Canning's Communications in January and March, 1823. Annual Register, vol. lxvi. Public Documents.

(*a*) Vattel, b. 2, c. 4, sec. 56; Rutherforth, b. 2, c. 9. See, also, Grotius, lib. 2, c. 25, sec. 8; Puff. b. 8, c. 6, sec. 14. The American Secretary of State, (Mr. Webster,) in his letter to Lord Ashburton, of April 21, 1841, declared, that it was "a manifest and gross impropriety for individuals to engage in the civil conflicts of other states, and thus to be at war, while their government is at peace"; and that "the salutary doctrine of non-intervention by one nation with the affairs of others, is liable to be essentially impaired, if, while the government refrains from interference, interference is still allowed to its subjects, individually or in masses"; and that "the United States have

may be afforded, consistently with the law of nations, in extreme cases, as when rulers have violated the principles of the social compact, and given just cause to their subjects to consider themselves discharged from their allegiance. Vattel mentions the case of the Prince of Orange as a justifiable interference, because the tyranny of James II. had compelled the English nation to rise in their defence, and call for his assistance. The right of interposition must depend upon the special circumstances of the case. It is not susceptible of precise limitations, and is extremely delicate in the application. It must be submitted to the guidance of eminent discretion, and controlled by the principles of justice and sound policy. It would clearly be a violation of the law of nations, to invite subjects to revolt who were under actual obedience, however just their complaints; or to endeavor to produce discontents, violence, and rebellion in neighboring states, and, under color of a generous assistance, to consummate projects of ambition and dominion. The most unexceptionable precedents are those in which the interference did not take place until the new states had actually been established, and sufficient means and spirit had been displayed
* 25 to excite a confidence * in their stability. (*a*) The assistance that England gave to the United Netherlands when they were struggling against Spain, and the assistance that France gave to this country during the war of our Revolution, were justifiable acts, founded in wisdom and policy. And equally justifiable was the interference of the European powers of France, Great Britain, and Russia, in favor of the Greeks, against the Ottoman Porte, by the treaty for the pacification of Greece, concluded by those three Christian powers in 1827, and by means of which a ferocious and destructive war was terminated by the independence of the Greek state as a new kingdom, and a recognition of that independence by the Ottoman Porte in 1832. So, also, there was a successful interference in 1840, of four of the great European powers, Austria, Great Britain, Prussia, and Russia, in the civil war between the Ottoman Porte and Mehemet Ali, the Pacha of Egypt. These, as

been the first among civilized nations to enforce the observance of the just rule of neutrality and peace, by special and adequate legal enactments against allowing individuals to make war on their own authority, or to mingle themselves in the belligerent operations of other nations."

(*a*) The Comm. Pinheiro-Ferreira, in his Cours de Droit Public, tom. ii. pp. 6, 7, very decidedly justifies the recognition, when the revolted people have acquired such stability.

well as other acts and pacifications, have effectually placed Turkey within the pale of the public law of Europe. And lastly, there was a memorable interference of the five great European powers in the Belgic revolution of 1830, which ended in the separation of Belgium from Holland, and the establishment of the former as an independent state. The several cases have given recent and practical illustration of the principle of international law, in its application to the preservation of the public peace and security of nations, against internal as well as external violence and oppression. It has been well observed, (*b*) that non-interference is the general rule, and cases of justifiable interference form exceptions limited by the necessity of the case. It was stated, on the part of the British ministry, in Parliament, by Lord Palmerston, in 1847, as a rule laid down by writers on the law of nations, that when civil war is regularly established in a country, and when the nation is divided into conflicting armies and opposing camps, the two parties in such war may be dealt with by other powers as if they were separate communities, and that such other powers may take part with one side or the other, according to their sympathies and interests, just as they might in a war between separate and independent nations. Such interference, however justifiable and safe, will be rare, and requires the exercise of eminent discretion. It is not to be doubted that the government of the United States had a perfect right, in the year 1822, to consider, as it then did, the Spanish Provinces in South America as legitimate powers, which had attained sufficient solidity and strength to be entitled to the rights and privileges belonging to independent states. (*c*)

Prior to the recognition of the independence of any of the Spanish colonies in America, and during the existence of the civil war between Spain and her colonies, it was the declared policy of the government of the United States, in recognizing the independence of the Spanish American republics, to remain neutral, and to allow to each of the belligerent parties the same rights of asylum and hospitality, and to consider them, in respect to the neutral relation and duties of the United States, as equally entitled to the sove-

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(*b*) Wheaton's Elements, p. 120.

(*c*) President's Message to Congress of 8th of March, 1822, and Act of Congress of 4th of May, 1822, c. 52.

reign rights of war as against each other. (*d*) This was also the judicial doctrine of the Supreme Court, derived from the policy of the government, and seems to have been regarded as a principle of international law. (*e*)

Treaties not affected by change of government.

Nations are at liberty to use their own resources in such manner, and to apply them to such purposes as they may deem best, provided they do not violate the perfect rights of other nations, nor endanger their safety, nor infringe the indispensable duties of humanity. They may contract alliances with particular nations, and grant or withhold particular privileges in their discretion. By positive engagements of this kind, a new class of rights and duties is created, which forms the conventional law of nations, and constitutes the most diffusive, and, generally, the most important branch of public jurisprudence.

(*d*) President's Message to Congress in 1822, and Proclamation in that year.

(*e*) United States *v.* Palmer, 3 Wheaton, 610, 634; The Santissima Trinidad, 7 Wheaton, 283, 337. See, also, Walley *v.* Schooner Liberty, 12 Louisiana, 98. "The uniform policy and practice of the United States, as declared by President Jackson, in his Message to Congress of the 21st December, 1836, is to avoid all interference in disputes which merely relate to the internal government of other nations, and eventually to recognize the authority of the prevailing party, without reference to the merits of the original controversy. All questions relative to the government of foreign nations, whether of the old or new world, have been treated by the United States as questions *of fact* only, and they have cautiously abstained from deciding upon them, until the clearest evidence was in their possession to enable them to decide correctly." It was further observed, by the American Secretary of State, (Mr. Forsyth,) in 1837, in his answer to the Texan Envoy, that in determining with respect to the independence of other countries, the United States have never taken the *question of right* between the contending parties into consideration. They have deemed it a dictate of duty and policy to decide upon the question as one *of fact* merely. It belongs to the legislative or executive power, (according to the character of the government,) to recognize the independence of a people in revolt from their foreign sovereign; and until such acknowledgment be made, courts of justice are bound to consider the ancient state of things as remaining unaltered. City of Berne *v.* Bank of England, 9 Vesey, 347; The Manilla, 1 Edw. Adm. 1; Yrisarri *v.* Clements, 3 Bing. 432; Thompson *v.* Powles, 2 Sim. 194; Taylor *v.* Barclay, ib. 213; Rose *v.* Himely, 4 Cranch, 241; Hoyt *v.* Gelston, 13 Johns. 139, 141; United States *v.* Palmer, 3 Wheaton, 610.[1]

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[1] The recognition of the independence of Texas belonged exclusively to that department of the United States Government, which was charged with its foreign relations. Kennet *v.* Chambers, 14 How. U. S. 38.

On the accession of Napoleon III. to the imperial throne, Mr. Webster wrote to Mr. Rives: "As the diplomatic representative of your country in France, you will act as your predecessors have acted, and conform to what appears to be settled national authority." Cong. Doc. 1851–2, vol. 4, Doc. 19. See Roman Law by Lord Mackenzie, (ed. 1862,) 62, 63.

And it is well to be understood, at a period when alterations in the constitutions of governments, and revolutions in states, are familiar, that it is a clear position of the law of nations, that treaties are not affected, nor positive obligations of any kind with other powers, or with creditors, weakened, by any such mutations. A state neither loses any of its rights, nor is discharged from any of its duties, by a change in the form of its civil government. The body politic is still the same, though it may have a different organ of communication. (*f*) So, if a state should be divided in respect to territory, its rights and obligations are not impaired; and if they have *not been apportioned by special agreement, *26 those rights are to be enjoyed, and those obligations fulfilled, by all the parts in common. (*a*)

Jurisdiction over adjoining seas.

The extent of jurisdiction over the adjoining seas, is often a question of difficulty and of dubious right. As far as a nation can conveniently occupy, and that occupancy is acquired by prior possession or treaty, the jurisdiction is exclusive. Navigable rivers which flow through a territory, and the sea-coast adjoining it, and the navigable waters included in bays, and between headlands and arms of the sea, belong to the sovereign of the adjoining territory, as being necessary to the safety of the nation, and to the undisturbed use of the neighboring shores. (*b*) The open sea is not capable of being possessed as private property. The free use of the ocean, for navigation and fishing, is common to all mankind, and the public jurists generally and explicitly deny that the main ocean can ever be appropriated. The subjects of all nations meet there, in time of peace, on a footing of entire equality and independence. No nation has any right or jurisdiction at sea, except it be over the persons of its own subjects, in its own public and private vessels; and so far territorial jurisdiction may be considered or preserved, for the vessels of a nation are, in many respects, considered as portions of its territory, and persons on board are pro-

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(*f*) Grotius de Jure, lib. 2, c. 9, sec. 8; Puff. Droit de la Nature et des Gens, par Barbeyrac, tom. ii. liv. 8, c. 12, sec. 2, 3; Burlamaqui, Nat. and Pol. Law, vol. ii. part 4, c. 9, sec. 16; Rutherforth's Institutes, b. 2, c. 10; Vattel, b. 2, sec. 85; Protocol of the five great powers of Austria, Great Britain, France, Prussia, and Russia, by their plenipotentiaries at London, December, 1830, stated in Wheaton's History of the Law of Nations, New York, 1845, pp. 538–546.

(*a*) Rutherforth, b. 2, c. 10.

(*b*) Grotius, b. 2, c. 2, sec. 12; c. 3, sec. 7; Puff. b. 3, c. 3, sec. 4; b. 4, c. 5, sec. 3 and 8; Vattel, b. 1, c. 22, 23.

tected and governed by the law of the country to which the vessel belongs. They may be punished for offences against the municipal laws of the state, committed on board of its public and private vessels at sea, and on board of its public vessels in foreign ports. (*c*) This jurisdiction is confined to the ship; and no one ship has a right to prohibit the approach of another at sea, or to draw round her a line of territorial jurisdiction, within which no other is at liberty to intrude. Every vessel, in time of peace, has a
*27 right to consult its own safety and convenience, * and to pursue its own course and business, without being disturbed, when it does not violate the rights of others. (*a*) As to narrow seas and waters approaching the land, there have been many and sharp controversies among the European nations, concerning the claim for exclusive dominion. The questions arising on this claim are not very clearly defined and settled, and extravagant pretensions are occasionally put forward. The subject abounds in curious and interesting discussions, and, fortunately for the peace of mankind, they are, at the present day, matters rather of speculative curiosity than of use.

Grotius published his Mare Liberum against the Portuguese claim to an exclusive trade to the Indies, through the South Atlantic and Indian Oceans, and he shows that the sea was not capable of private dominion. He vindicates the free navigation of the ocean, and the right of commerce between nations, and justly exposes the folly and absurdity of the Portuguese claim. Selden's Mare Clausum was intended to be an answer to the doctrine of Grotius, and he undertook to prove, by the laws, usages, and opinions of all nations, ancient and modern, that the sea was, in point of fact, capable of private dominion; and he poured a flood of learning over the subject. He fell far short of his great rival in the force and beauty of his argument, but he entirely surpassed him in the extent and variety of his citations and researches. Having established the fact, that most nations had conceded that the sea was capable of private dominion, he showed, by numerous documents and records, that the English nation had always asserted and enjoyed a supremacy over the surrounding or narrow seas,

(*c*) Grotius, b. 2, c. 3, sec. 10 and 13; Rutherforth, b. 2, c. 9; Vattel, b. 1, c. 19, sec. 216; Forbes *v.* Cochrane, 2 Barn. & Cress. 448; Wheaton's Elements of International Law, 3d edit. 157; Edinburgh Review for July, 1841, pp. 294, 295.

(*a*) The Marianna Flora, 11 Wheaton, 38.

and that this claim had been recognized by all the neighboring nations. Sir Matthew Hale considered the title of the king to the narrow seas adjoining the coast of England, to have been abundantly proved by the treatise of Selden; and Butler speaks of it * as a work of profound erudition. (*a*) Bynkershoek has * 28 also written a treatise on the same contested subject, in which he concedes to Selden much of his argument, and admits that the sea was susceptible of dominion, though he denies the title of the English, on the ground of a want of uninterrupted possession. He said there was no instance, at that time, in which the sea was subject to any particular sovereign, where the surrounding territory did not belong to him. (*b*)

The claim of dominion to close or narrow seas, is still the theme of discussion and controversy. Puffendorf (*c*) admits, that, in a narrow sea, the dominion of it, and the right of fishing therein, may belong to the sovereigns of the adjoining shores. Vattel also (*d*) lays down the position, that the various uses to which the sea contiguous to the coast may be applied, render it justly the subject of property. People fish there, and draw from it shells, pearls, amber, &c.; and who can doubt, he observes, but that the pearl fisheries of Bahram and Ceylon may be lawfully enjoyed as property? Chitty, in his work on commercial law, (*e*) has entered into an elaborate vindication of the British title to the four seas surrounding the British Islands, and known by the name of the British Seas, and, consequently, to the exclusive right of fishing, and of controlling the navigation of foreigners therein. On the other hand, Sir Wm. Scott, in the case of The Twee Gebroeders, (*f*) did not treat the claim of territory to contiguous portions of the sea with much indulgence. He said the general inclination of the law was against it; for in the sea, out of the reach of cannon-shot, universal use was presumed, in like manner as a common use in rivers flowing through conterminous states was presumed; and yet, in both cases, * there might, by legal possibility, * 29 exist a peculiar property, excluding the universal, or the

(*a*) Harg. Law Tracts, 10; Co. Litt. lib. 3, n. 205.
(*b*) Dissertatio de Dominio Maris; Bynk. Opera, tom. ii. 124.
(*c*) Droit de la Nat. et des Gens, liv. 4, c. 5, sec. 5 – 10.
(*d*) B. 1, c. 23.
(*e*) Vol. i. 88 – 102.
(*f*) 3 Rob. Adm. 336.

common use. The claim of Russia to sovereignty over the Pacific Ocean north of the 51st degree of latitude, as a close sea, was considered by our government in 1822, to be against the rights of other nations. (*a*) It is difficult to draw any precise or determinate conclusion, amidst the variety of opinions, as to the distance to which a state may lawfully extend its exclusive dominion over the sea adjoining its territories, and beyond those portions of the sea which are embraced by harbors, gulfs, bays, and estuaries, and over which its juridiction unquestionably extends. (*b*) All that can reasonably be asserted is, that the dominion of the sovereign of the shore over the contiguous sea, extends as far as is requisite for his safety, and for some lawful end. A more extended dominion must rest entirely upon force and maritime supremacy. According to the current of modern authority, the general territorial jurisdiction extends into the sea as far as cannon-shot will reach, and no farther; and this is generally calculated to be a marine league; and the Congress of the United States have recognized this limitation, by authorizing the District Courts to take cognizance of all captures made within a marine league of the American shores. (*c*) The executive authority of this country, in 1793, considered the whole of Delaware Bay to be within our territorial jurisdiction; and it rested its claims upon those authorities which admit that gulfs, channels, and arms of the sea, belong to the people with whose lands they are encompassed. It was intimated that the law of nations would justify the United States in attaching to their coasts an extent into the sea beyond the reach of cannon-shot. (*d*)

* 30 * Considering the great extent of the line of the American

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(*a*) Mr. Adams's Letter to the Russian Minister, March 30th, 1822.

(*b*) Azuni on the Maritime Law of Europe, vol. i. p. 206.

(*c*) Bynk. Q. Pub. J. c. 8; Vattel, b. 1, c. 23, sec. 289; Act of Congress, June 5th, 1794, c. 50; The King *v.* Forty-nine Casks of Brandy, 3 Hagg. Adm. 257. By the convention at London of the 13th July, 1841, between Great Britain, France, Austria, Prussia, and Russia, and the Ottoman Porte, it was declared and agreed to be an established principle of public law, that no ships of war of foreign powers should enter into the Straits of the Dardanelles and of the Bosphorus, thereby placing the territorial jurisdiction of the Sultan over the interior waters of his empire, under the protection of the written public law of Europe. Wheaton's History of the Law of Nations, New York, 1845, p. 584.

(*d*) Opinion of the Attorney-General concerning the seizure of the ship Grange, dated 14th of May, 1793, and the Letter of the Secretary of State to the French Minister, of 15th of May, 1793.

coasts, we have a right to claim, for fiscal and defensive regulations, a liberal extension of maritime jurisdiction; and it would not be unreasonable, as I apprehend, to assume, for domestic purposes connected with our safety and welfare, the control of the waters on our coasts, though included within lines stretching from quite distant headlands, as, for instance, from Cape Ann to Cape Cod, and from Nantucket to Montauk Point, and from that point to the capes of the Delaware, and from the south cape of Florida to the Mississippi. It is certain that our government would be disposed to view with some uneasiness and sensibility, in the case of war between other maritime powers, the use of the waters of our coast, far beyond the reach of cannon-shot, as cruising ground for belligerent purposes. In 1793, our government thought they were entitled, in reason, to as broad a margin of protected navigation as any nation whatever, though at that time they did not positively insist beyond the distance of a marine league from the seashores; (*a*) and, in 1806, our government thought it would not be unreasonable, considering the extent of the United States, the shoalness of their coast, and the natural indication furnished by the well-defined path of the Gulf Stream, to expect an immunity from belligerent warfare, for the space between that limit and the American shore. It ought, at least, to be insisted, that the extent of the neutral immunity should correspond with the claims maintained by Great Britain around her own territory, and that no belligerent right should be exercised within "the chambers formed by headlands, or anywhere at sea within the distance of four leagues, or from a right line from one headland to another." (*b*) In *the case of The Little Belt, which was *31
cruising many miles from the shore between Cape Henry and Cape Hatteras, our government laid stress on the circumstance that she was "hovering on our coasts"; and it was contended on the part of the United Sates, that they had a right to know the national character of armed ships in such a situation, and that it was a right immediately connected with our tranquillity and peace. It was further observed, that all nations exercise the right, and none with more rigor, or at a greater distance from the coast, than Great Britain, and none on more justifiable grounds than the

(*a*) Mr. Jefferson's Letter to Mr. Genet, November 8th, 1793.

(*b*) Mr. Madison's Letter to Messrs. Monroe and Pinckney, dated May 17th, 1806.

United States. (*a*) There can be but little doubt, that as the United States advance in commerce and naval strength, our government will be disposed more and more to feel and acknowledge the justice and policy of the British claim to supremacy over the narrow seas adjacent to the British isles, because we shall stand in need of similar accommodation and means of security. (*b*)

It was declared in the case of Le Louis, (*c*) that maritime states claim, upon a principle just in itself, and temperately applied, a right of visitation and inquiry within those parts of the ocean adjoining to their shores. They were to be considered as parts of the territory for various domestic purposes, and the right was admitted by the courtesy of nations. The English hovering laws were founded upon that right. The statute 9 Geo. II. c. 35, prohibited foreign goods to be transshipped within four leagues of the coast without payment of duties; and the Act of Congress of March 2d, 1799, c. 128, sec. 25, 26, 27, 99, contained the same prohibition; and the exercise of jurisdiction, to that distance, for the safety and protection of the revenue laws, was declared by the Supreme Court in *Church* v. *Hubbart*, (*d*) to be conformable to the laws and usages of nations.

Rights of commerce.

* 32 As the end of the law of nations is the happiness and perfection * of the general society of mankind, it enjoins upon every nation the punctual observance of benevolence and good will, as well as of justice, towards its neighbors. (*a*) This is equally the policy and the duty of nations. They ought to cultivate a free intercourse for commercial purposes, in order to supply each other's wants, and promote each other's prosperity. The variety of climates and productions on the surface of the globe, and the facility of com-

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(*a*) Mr. Monroe's Letter to Mr. Foster, October 11th, 1811, and President's Message, November 5th, 1811.

(*b*) In placing the commerce and navigation of states, by treaties of commerce, on the basis of equality, it is sometimes deemed advisable to except in express terms the *coasting trade* or *coastwise navigation*, of the respective parties, and to reserve the regulation of that trade to the separate laws of each nation. See the convention of commerce and navigation between the United States and the Peru-Bolivian Confederation, May 28, 1838, and between them and the Kingdom of Greece, August, 1838, and between them and Portugal, April, 1841, and between them and the Republic of Ecuador, June 13, 1839.

(*c*) 2 Dod. Adm. 245.

(*d*) 2 Cranch, 187.

(*a*) Vattel's Prelim. sec. 12, 13, b. 2, c. 1, sec. 2, 3.

munication, by means of rivers, lakes, and the ocean, invite to a liberal commerce, as agreeable to the law of nature, and extremely conducive to national amity, industry, and happiness. (*b*) The numerous wants of civilized life can only be supplied by mutual exchange between nations of the peculiar productions of each; and who that is familiar with the English classics, has not dwelt with delight on the description of the extent and blessings of English commerce, which Addison has given, with such graceful simplicity and such enchanting elegance, in one of the Spectator's visits to the Royal Exchange? (*c*) But as every nation has the right, and is disposed to exercise it, of judging for itself, in respect to the policy and extent of its commercial arrangements, the general freedom of trade, however reasonably and strongly it may be inculcated in the modern school of political economy, is but an imperfect right, and necessarily subject to such regulations and restrictions as each nation may think proper to prescribe for itself. Every state may monopolize as much as it pleases of its own internal and colonial trade, or grant to other nations, with whom it deals, such distinctions and particular privileges as it may deem conducive to its interests. (*d*) The celebrated English *navigation act of Charles II. contained nothing, said Martens, contrary to the law of nations, notwithstanding it was very embarrassing to other countries. When the United States put an entire stop to their commerce with the world, in December, 1807, by laying a general embargo on their trade, without distinction as to nation, or limit as to time, no other power complained of it; and the foreign government most affected by it, and against whose interests it was more immediately directed, declared to our government, (*a*) that as a municipal regulation, foreign states had no concern with it, and that the British government did not conceive that they had the right, or the pretension, to make any complaint of it, and that they had made none. *33

No nation has a right, in time of peace, to interfere with, or

(*b*) Vattel, b. 2, c. 2, sec. 21.

(*c*) Spectator, vol. i. No. 69.

(*d*) Puff. b. 4, c. 5, sec. 10. Vattel, b. 1, c. 8, sec. 92, 97; Martens's Compendium of the Law of Nations, 146, 148; 1 Chitty on Commercial Law, 76–81; Mr. Canning's Letters to Mr. Gallatin, of September 11th and November 13th, 1826; Mr. Gallatin to Mr. Canning, September 22d and December 28th, 1826, and Mr. Clay to Mr. Gallatin, November 11th, 1826.

(*a*) Mr. Canning's Letter to Mr. Pinckney, September 23d, 1808.

interrupt, any commerce which is lawful by the law of nations, and carried on between other independent powers, or between different members of the same state. The claim of the Portuguese, in the height of their maritime power in India, to exclude all European people from commerce with Asia, was contrary to national law, and a just cause of war. Vattel called it a pretension no less iniquitous than chimerical. (*b*) The attempt of Russia to appropriate to herself an exclusive trade in the North Pacific, met with a prompt resistance on the part of this country; and the government of the United States claimed for its citizens the right to carry on trade with the aboriginal natives, on the northwest coast of America, without the territorial jurisdiction of other nations, even in arms and munitions of war. (*c*)

Commercial Treaties.

Treaties of commerce, defining and establishing the rights and extent of commercial intercourse, have been found to be of great utility; and they occupy a very important title in the code of national law. They were considered, *even two centuries ago, to be so conducive to the public welfare as to overcome the bigotry of the times; and Lord Coke (*a*) admitted them to be one of the four kinds of national compacts that might, lawfully, be made with infidels. They have multiplied exceedingly within the last century, for it has been found by experience, that the general liberty of trade, resting solely on principles of common right, benevolence, and sound policy, was too vague and precarious to be consistent with the safety of the extended intercourse and complicated interests of great commercial states. Every nation may enter into such commercial treaties, and grant such special privileges, as they think proper; and no nation, to whom the like privileges are not conceded, has a right to take offence, provided those treaties do not affect their perfect rights. A state may enter into a treaty, by which it grants exclusive privileges to one nation, and deprives itself of the liberty to grant similar privileges to any other. Thus, Portugal, in 1703, by her treaty with England, gave her the monopoly of her wine trade; and the Dutch, formerly, by a treaty with Ceylon, engrossed the cinnamon trade, and, latterly, they

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(*b*) B. 2, c. 2, sec. 24.

(*c*) Mr. Adams's Letter to the Russian Minister, March 30th, 1822. See, also, Mr. Forsyth's Letter to the American Minister at St. Petersburg, November 3d, 1837.

(*a*) 4 Inst. 155.

have monopolized the trade with Japan. (*b*)[1] These are matters of strict legal right; but it is, nevertheless, in a moral sense, the duty of every nation to deal kindly, liberally, and impartially towards all mankind, and not to bind itself by treaty with one nation, in contravention of those general duties which the law of nature dictates to be due to the rest of the world. (*c*)

Every nation is bound, in time of peace, to grant a passage, for lawful purposes, over their lands, rivers, and seas, to the people of other states, whenever it can be permitted without inconvenience; and burdensome conditions ought not to be annexed to the transit of persons and property. If, however, any government deems the introduction of foreigners, or their merchandise, injurious to the interests of their own people, they are at liberty to withhold the indulgence. The entry of foreigners and their effects is not an absolute right, but only one of imperfect obligation, and it is subject to the discretion of the government which tolerates it. (*a*) The state

Passage over foreign territory.

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(*b*) Chitty Comm. Law, 40, 41, 42.

(*c*) It has been the policy of the United States to encourage, in its diplomatic intercourse with other nations, the most perfect freedom and equality in relation to the rights and interests of *navigation*. This is the principle contained in the commercial treaty between the United States and the federation of Central America, of the 5th December, 1825. By that treaty, whatever can be imported into, or exported from, the ports of the one country, in its own vessels, may, in like manner, and upon the same terms and conditions, be imported or exported in the vessels of the other country. The same rule is contained in the treaties of the United States with Denmark, Sweden, and the Hanseatic cities.[2]

(*a*) Puff. b. 3, c. 3, sec. 5, 6, 7; Rutherforth, b. 2, c. 9; Vattel, b. 2, c. 7, sec. 94; c. 8, sec. 100; c. 9, sec. 123, 130; c. 10, sec. 132; 1 Chitty, 84 – 89; M. Pinheiro-Ferreira

[1] By late treaties with the United States, France, Russia, and Great Britain, Japan has consented to trade with these nations, and this monopoly no longer exists. 11 U. S. Stat. 597.

[2] And see the treaties with Peru, July 26, 1851, and with the Argentine Confederation, July 27, 1853, 10 U. S. Stat. 926, 1005.

The treaties referred to also prove, that this policy is furthered, by imposing on ships and cargoes of foreign nations the same discriminating charges and duties, exacted by them from American vessels and cargoes.

At different times Russia, Austria, Prussia, Sardinia, Greece, Brazil, Ecuador, Venezuela, and other of the South American states, and, in 1849, Great Britain, (12 & 13 Vict. c. 29,) have acceded to the offer of complete freedom and reciprocity in respect to navigation which at an early period in their history the United States extended to all nations. An instructive historical sketch of the progress of this liberal policy may be found in the opinion of the court, per Wayne J., in Oldfield *v.* Marriott, 10 How. U. S. 146.

may even levy a tax or toll upon the persons and property of strangers *in transitu*, provided the same be a reasonable charge, by way of recompense for the expense which the accommodation creates. (*b*) These things are now generally settled in commercial treaties, by which it is usually stipulated, that there shall be free navigation and commerce between the nations, and a free entry to persons and property, subject to the ordinary revenue and police laws of the country, and the special terms and conditions prescribed by treaty.

Use of navigable rivers.

A nation possessing only the upper parts of a navigable river, is entitled to descend to the sea without being embarrassed by useless and oppressive duties or regulations. It is doubtless a right of imperfect obligation, but one that cannot be justly withheld without good cause. When Spain, in the year 1792, owned the mouth, and both banks of the lower Mississippi, and the United States the left bank of the upper portion of the same, it was strongly contended on the part of the United States, that by the law of nature and nations, we were entitled to the navigation of that river to the sea, subject only to such modifications as Spain might reasonably deem necessary for her safety and fiscal accommodation. It was further contended, that the right to the end carried with it, as an incident, the right to the means requisite to attain the end; such, for instance, *36 as the right *to moor vessels to the shore, and to land in cases of necessity. The same clear right of the United States to the free navigation of the Mississippi through the territories of Spain to the ocean, was asserted by the Congress under the confederation. (*a*) The claim in that case, with the qualifications annexed to it, was well grounded on the principles and

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(Cours de Droit Public, tome ii. pp. 19, 20,) complains vehemently of the checks created by passports and the preventive police of the continental governments of Europe, upon emigration and the transit and sojourn of foreigners. He calls it legal tyranny, and contrasts such policy with that of the United States, "the classic land of civil liberty." But I am of opinion, notwithstanding, that every government has the right, and is bound in duty, to judge for itself, how far the unlimited power of emigration, and of the admission and residence of strangers and emigrants, may be consistent with its own local interests, institutions, and safety.

(*b*) Rutherforth, b. 2, c. 9; Vattel, b. 2, c. 10, sec. 124; 1 Chitty, 103–106.

(*a*) Instructions given to Mr. Jay in 1780, and again in 1785; Resolution of Congress of September, 1788; Report of the Secretary of State to the President, March 18th, 1792.

authorities of the law of nations. (*b*) The like claim, and founded on the same principles of natural law, and on the authority of jurists and the conventional law of nations, has been made on behalf of the people of the United States to navigate the St. Lawrence to and from the sea, and it has been discussed at large between the American and British governments. (*c*)

(*b*) Grotius, lib. 2, c. 2, sec. 11, 12, 13, 15; c. 3, sec. 12; Puff. lib. 3, c. 3, sec. 5, 6, 8; Vattel, b. 1, sec. 292; b. 2, sec. 127, 129, 132. By the treaty of peace at Paris, in 1815, it was stipulated that the navigation of the Rhine and the Scheldt should be free; and at the Congress of Vienna, in 1815, the allied sovereigns agreed to the free navigation of the *great navigable rivers of Germany and ancient Poland*, to their mouths, in favor of all who should conform to the regulations under which the affranchisement was to be granted. The detailed conventions consequent on the act of the Congress of Vienna, have applied the principles adopted by the Congress, founded on the Memoir of Baron Von Humboldt, to regulate the navigation of the Rhine, the Scheldt, the Meuse, the Moselle, the Elbe, the Oder, the Weser, the Vistula, the Danube, and the Po, with their confluent rivers. The English government, so late as 1830, continued to assert a right, under the treaty of Vienna, or federal act of 1815, to the free navigation of the Rhine, and to hold that it was accessible to the vessels of all nations, to the extent of its navigation, subject to moderate duties, for the preservation of the paths on the sides of the river, and for the maintenance of the proper police. And by the convention concluded at Mayence, March 31st, 1831, between all the riparian states of the Rhine, the navigation of that river was declared free, from the point where it becomes navigable into the sea, including its two principal outlets or mouths in the kingdom of the Netherlands, the *Leck* and the *Waal*, passing by Rotterdam and Briel, through the first-named outlet, and by Dordrecht and Hellevoetsluis, through the latter, with the use of the artificial canal of Voorn and Hellevoetsluis. The convention provides regulations of police and toll duties on vessels and merchandise passing to and from the sea, through the Netherlands, and by the different ports of the upper states on the Rhine. Wheaton's Elements of International Law, 3d edit. 243–247; his History of the Law of Nations in Europe and America, New York, 1845, pp. 498–506.

(*c*) Mr Wheaton in his Elements of International Law, 3d edit. 248–257, and in his History of the Law of Nations, pp. 506, 517, has given the substance of the arguments, *pro* and *con*, taken from congressional documents of the sessions of 1827 and 1828. It was insisted, on the part of Great Britain, that this right of passage was not an absolute natural right, but an imperfect right, restricted to the right of transit for purposes of innocent utility, to be exclusively determined by the local sovereign. The commissioners and diplomatists of the United States, in 1805, and afterwards, stated, as a principle of international law, that when any European nation took possession of any extent of sea-coast, that possession extended into the interior country to the sources of the rivers emptying into that coast and to their mouths, with the bays and entrances formed by their junction with the sea, and to all the tributary streams or branches, and the country they covered. The authority of Vattel, b. 1, p. 266, is in support of that principle in a qualified degree, and is to be confined to the rivers *so far as they flow within the territory*. Mr. Wheaton, in his Elements of International Law, 3d edit. 1842, very justly confines such a claim of dominion of the state to the seas and rivers *entirely enclosed within its limits*.[1]

[1] The treaty concluded between Great Britain and the United States, June 5, 1854,

When foreigners are admitted into a state upon free and liberal terms, the public faith becomes pledged for their protection. The courts of justice ought to be freely open to them as a resort for the redress of their grievances. But strangers are equally bound with natives, to obedience to the laws of the country during the time they sojourn in it, and they are equally amenable for infractions of the law. It has sometimes been made a question, how far one government was bound by the law of nations, and independent of treaty, to surrender, upon demand, fugitives from justice, who, having committed crimes in one country, flee to another for shelter. It is declared by some of the most distinguished public jurists, (*d*) that every

Surrender of criminals.

(*d*) Grotius, b. 2, c. 21, sec. 3, 4, 5, and Heineccius Com. h. t. Burlamaqui, vol. ii. part 4, c. 3, sec. 23 – 29; Rutherforth, b. 2, c. 9, vol. ii. p. 496; Vattel, b. 2, c. 6, sec. 76, 77. See Questions de Droit, tit. Etranger, par Merlin, for discussions on this subject in France. P. Voet, de Statutis, p. 297, says, that the surrender of criminals is denied according to the usage of almost all Christain nations, except in cases of humanity, (*nisi ex humanitate,*) and Martens is of the same opinion. Martens's Law of Nations, b. 3, c. 3, sec. 23. The English decisions in support of the right and practice of surrender of fugitives charged with atrocious crimes, are, Rex *v.* Hutchinson, 3 Keble, 785; Case of Lundy, 2 Vent. 314; Rex *v.* Kimberly, Str. 848; S. C. Barnard, K. B. vol. i. 225; Fitzgib. 111; East India Company *v.* Campbell, 1 Vesey, 246; Heath J. in Mure *v.* Kay, 4 Taunt. 34; Eunomus, Dialog. 3, sec. 67; Sergeant Hill's opinion (and his authority and learning as a lawyer were pre-eminent) given to government in 1792. See Edin. Review, No. 83, pp. 129, 139, 141. Lord Coke, however, held that the sovereign was not bound to surrender up fugitive criminals from other countries. 3 Inst. 180. The American decisions on the question are, in the matter of Washburn, 4 Johns. Ch. 106; Commonwealth *v.* Deacon, 10 Serg. & Rawle, 125; Rex *v.* Ball, decided by Ch. J. Reid, at Montreal, and reported in Amer. Jur. 297; case of José Ferreire dos Santos, 2 Brockenbrough, 493.[2] Two of those, viz. that in 4th Johnson and before Ch. J. Reid, are for the duty of surrender, and the other two against it, unless specially provided for by treaty. Mr. Justice Story cites the conflicting authorities, both foreign and domestic, on this interesting question; but intimates no opinion. Comm. Constitution, vol. iii. pp. 675, 676; Comm. Conflict of Laws, pp. 520 – 552. But afterwards, in the United States *v.* Davis, 2 Sumner, 486, Judge Story expressed great doubts whether, upon principles of international law, and independent

familarly cited as the Reciprocity Treaty, grants to the citizens of the latter country the right to navigate the river St. Lawrence, and the canals in Canada used as the means of communication between the great lakes and the Atlantic Ocean, as fully and freely as the subjects of Great Britain, and liable to the same tolls and assessments as now are, or hereafter may be, imposed on them. Great Britain has made no admission of the right which the United States claims, and, indeed, expressly retains by the treaty the power of suspending the privilege granted, on giving due notice thereof to the United States. 10 U. S. Stat. 1089; 18 & 19 Vict. c. 3, § 4.

[2] See also Matter of Clark, 9 Wendell, 212.

* state is bound to deny an asylum to criminals, and, upon * 37
application and due examination of the case, to surrender the fugitive to the foreign state where the crime was committed. The language of those authorities is clear and explicit, and the law and usage of nations, as declared by them, rest on the plainest principles of justice. It is the duty of the government to surrender up fugitives upon demand, after the civil magistrate shall have ascertained the existence of reasonable grounds for the charge, and sufficient to put the accused upon his trial. The guilty party cannot be tried and punished by any other jurisdic-

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of statute or treaty, any court of justice is authorized to surrender a fugitive from justice. In the spring of 1839, George Holmes, being charged with the crime of murder, committed in Lower Canada, fled into the State of Vermont, and his surrender was demanded by the Governor-General of Canada. Application was made by authority, in Vermont, to the President of the United States, who declined to act through an alleged want of power, and the case came back to the Governor of Vermont. After hearing counsel and giving the subject great consideration, Governor Jennison decided that it was his duty to surrender the fugitive. The case was afterwards, and before any actual surrender, carried up before the Supreme Court of that state upon *habeas corpus*, and elaborately argued in July, 1839, and the decision of the governor affirmed. The case was afterwards carried up to the Supreme Court of the United States, in the winter of 1840, and the court declared that they had no jurisdiction in the case. Holmes *v.* Jennison, 14 Peters U. S. 540. Holmes was thereupon brought up before the Supreme Court of Vermont by *habeas corpus*, in April, 1840, and the question solemnly argued, and the decision was, that the state had no authority to surrender the prisoner, and he was accordingly discharged from custody. Case *ex parte* Holmes, 12 Vermont, 631. It may be here properly observed that, according to the official opinion of the Attorney-General of the United States, 1797, it was the *duty* of the United States to deliver up, on due demand, heinous offenders, being fugitives from the dominions of Spain, and that, as the existing laws of the Union had not made any specific provision for the case, the defect ought to be supplied. Opinions of the Attorney-General, vol. i. 46. But afterwards, in 1821, the then Attorney-General of the United States, in an elaborate opinion given to the President, declared that the modern usage and practice of nations had been contrary to the doctrines of the early jurists, and that it was not now the law and usage of nations to deliver up fugitives from justice, whatever may be the nature or atrocity of the crime, unless it be in pursuance of a treaty stipulation. Opinions, &c. vol i. 384–392. If there be no treaty, he was of opinion that the government of the United States could not act on the subject, without authority conferred by an act of Congress, and which it would be expedient to grant, as the law is imperfect as it stands. Ibid. vol. ii. 832, 902. When it is declared as the settled rule, that the United States are not justified in the surrender of fugitives from justice, except in pursuance of a treaty stipulation, the United States are thus in effect declared, by national and state authorities, to be a safe asylum for all sorts of criminals, from all governments and territories, near or distant. So, also, all the high law authorities in Westminster Hall, in the case of The Creole, gave their opinions, in the British House of Lords, in February, 1842, that the English law and international law did not authorize the surrender of fugitive criminals of any degree, and that the right to demand and surrender must be founded on treaty, or it does not exist.

tion than the one whose laws have been violated, and, therefore, the duty of surrendering him applies as well to the case of the subjects of the state surrendering, as to the case of subjects of the power demanding the fugitive. The only difficulty, in the absence of positive agreement, consists in drawing the line between the class of offences to which the usage of nations does, and to which it does not apply, inasmuch as it is understood, in practice, to apply only to crimes of great atrocity, or deeply affecting the public safety. The act of the legislature of New York, of the 5th April, 1822, c. 148, gave facility to the surrender of fugitives, by authorizing the governor, in his discretion, on requisition from a foreign government, to surrender up fugitives charged with murder, forgery, larceny, or other crimes, which, by the laws of this state, were punishable with death or imprisonment in the state prison; provided the evidence of criminality was sufficient, by our laws, to detain the party for trial on a like charge. (*a*) Such a legislative provision was requisite, for the judicial power can do no more than cause the fugitive to be arrested and detained, until sufficient means and opportunity have been afforded for the discharge of this duty, to the proper organ of communication with the power that makes the demand. (*b*)

(*a*) The N. Y. Revised Statutes, vol. i. 164, sec. 8, 9, 10, 11, have adopted and continued the same provision.

(*b*) The constitution of the United States has provided for the surrender of fugitives from justice as *between the several states*, in cases "of treason, felony, and other crime"; but it has not designated the specific *crimes* for which a surrender is to be made, and this has led to difficulties as between the states. Thus, for instance, in 1839, the Governor of Virginia made application to the Governor of New York for the surrender of three men, charged by affidavit as being fugitives from justice, in *feloniously stealing and taking away from one Colley, in Virginia, a negro slave, Isaac, the property of Colley.* The application was made under the act of Congress of February 12, 1793, c. 7, sec. 1, founded on the constitution of the United States, art. 4, sec. 2, as being a case of "treason, felony, *or other crime,*" within the constitution and the law, and certified as the statute directed. The Governor of New York refused to surrender the supposed fugitives, on the ground that slavery and property in slaves did not exist in New York, and that the offence was not a *crime* known to the laws of New York, and consequently not a crime within the meaning of the constitution and statute of the United States. But the legislature of New York, by concurrent resolutions of the 11th of April, 1842, declared their opinion to be, that stealing a slave within the jurisdiction and against the laws of Virginia, was a crime within the meaning of the 2d section of the 4th article of the constitution of the United States. The executive and legislative authorities of Virginia also considered the case to be within the provision of the constitution and the law, and that the refusal was a denial of right. It was contended, that the constitution of the United States recognizes the lawful existence of slaves as property, for it apportions the representation among the states on the basis of distinction between free

The European nations, in early periods of modern history, made provision by treaty for the mutual surrender of criminals seeking refuge from justice. Treaties of this kind were made between England and Scotland in 1174, *and England and France in 1308, and France and Savoy, in 1378; and the last treaty made special provision for the surrender of criminals, though they should happen to be subjects of the state to which they had fled. Mr. Ward (*a*) considers these treaties as evidence of the advancement of society in regularity and order. (*b*) *38

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persons and other persons; and it provides, in art. 4, sec. 2, for their surrender, when escaping from one state to another: — that slaves were regarded by law as property in nearly all the states, and protected as such, and particularly in New York, when the constitution was made; that the repeal of those laws, and renunciation of that species of property, in one state, does not affect the validity of the laws, and of that species of property in another state; and that the refusal to surrender felons who steal that property in Virginia, and flee with it or without it to New York, on the ground that blacks are no longer regarded as property in New York, is a violation of the federal compact, and of the act of Congress founded thereon. This case and that of Holmes, mentioned in a preceding note, involve very grave considerations. I have read and considered every authority, document, and argument on the subject that were within my command, and in my humble view of the questions, I cannot but be of opinion, that the claim of the Canadian authorities in the one case, and of the Governor of Virginia in the other case, were equally well founded, and entitled to be recognized and enforced. In the case from Canada, the jurisdiction of it belonged exclusively to the authorities of Vermont. The United States have no jurisdiction in such cases, except under a treaty provision. The duty of surrendering on due demand from the foreign government, and on due preliminary proof of the crime charged, is part of the common law of the land, founded on the law of nations as part of that law; and the state executive is to cause that law to be executed, and to be assisted by judicial process, if necessary. The statute of New York is decisive evidence of the sense of that state, and it was in every respect an expedient, just, and wise provision, in no way repugnant to the constitution or law of the United States, for it was "no agreement or compact with a foreign power." The whole subject is a proper matter of state concern, under the guidance of municipal law, (stipulations in national treaties always excepted,) and if there be no express statute provision, the exercise of the power must rest in sound legal discretion, as to the nature of the crime and as to the sufficiency of the proof. The law of nations is not sufficiently precise to dispense with the exercise of that discretion. But private *murder*, as in the Vermont case, is free of all difficulty, and it would be dealing unjustly with the aggrieved foreign government, and be eminently disgraceful to the character of the state and to our constitutional authorities, to give an asylum to fugitives loaded with such atrocity. If there be no authority in this country, state or national, to surrender such a fugitive, then it is idle to talk about the authority of the law of nations as part of the common law. Then "public law, the personification, as it were, of natural justice, becomes a mere nonentity, the beautiful figment of philosophers, and destitute of all real influence on the fortunes of mankind."

(*a*) History of the Law of Nations, vol. ii. 318–320.

(*b*) By the treaty of amity, commerce, and navigation between Great Britain and the United States, in November, 1795, it was by the 27th article agreed, that persons

Ambassadors.

Ambassadors form an exception to the general case of foreigners resident in the country, and they are exempted absolutely from all allegiance, and from all responsibility to

charged with murder or forgery, seeking an asylum in the dominions of either party, should be delivered up on due requisition, provided the evidence of criminality be sufficient to justify apprehension and commitment for trial, if the offence had been committed in the jurisdiction where the requisition is made. But this treaty, on this and other points, expired by its own limitation after the expiration of twelve years. The provision was happily renewed by the treaty between the United States and the United Kingdom of Great Britain and Ireland, signed at Washington, August 9, 1842, and afterwards duly ratified. This treaty terminates the question, so far as the two countries are concerned, which had long embarrassed the councils and courts in this country. By the 10th article of the treaty it is declared, that the two powers respectively, upon requisitions by the due authorities, should deliver up to justice all persons who, being charged with the crime of murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged papers, committed within the jurisdiction of either, should seek an asylum, or should be found within the territories of the other; provided, that this should only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged should be found, would justify his apprehension and commitment for trial, if the crime or offence had there been committed. A similar convention was made between the United States and France, and ratified at Washington, April 12, 1844; but the provision was extended to the crime of an attempt to commit murder, and to rape, and embezzlement by public officers, when the same is punishable with infamous punishment. The treaty provisions would seem to require statute provisions of the several governments to carry the treaties for surrendering fugitives more promptly into effect.[1] The act of 8 and 9 Vict. c. 120, has such a provision in respect to the treaty of Washington, in 1842; without any special provision on the subject, the power and duty of duly carrying into effect treaties of that kind would belong, exclusive of the state authorities, to the courts and magistrates of federal jurisdiction. The legislature of the Kingdom of Belgium, by a law of the first of October, 1833, authorized the surrender of fugitives from foreign countries upon the charge of murder, rape, arson, counterfeiting the current coin or forging public bank paper, perjury, robbery, theft, peculation by public trustees and fraudulent bankrupts; but with the proviso, that the law of the foreign

[1] It has been held that persons charged with piracy may be arrested here and surrendered, without any special act of Congress to carry the treaty into effect. They may be examined and ordered into custody by a state magistrate. The application may be made by the British minister, although there has been no indictment found by the British tribunals, nor any warrant issued therefrom; the order for the surrender may be signed by the Secretary of State. The British Prisoners, 1 Wood. & Minot, 66.

On the 12th Aug. 1848, an Act was passed by Congress giving effect to treaty stipulations which existed, or thereafter might exist, with any foreign government for the apprehension and delivery of fugitives. The proceedings mentioned above would seem to be warranted under the act.

It is an approved rule in the policy of the United States not to grant or ask extradition, except in those cases which are exactly defined by express conventions. Opinions of the Attorneys-General, vol. vi. pp. 85, 431. Id. vol. vii. 642.

the laws of the country to which they are deputed. As they are representatives of their sovereigns, and requisite for negotiations

country be reciprocal in the case, and that the judgment or judicial accusation be duly authenticated, and the demand be made within the time of limitation prescribed by the Belgic law.[2] Pinheiro-Ferreira severely condemns this law, and contends for protection to the fugitive, and that the tribunals of the country to which he resorts should take cognizance of criminal cases equally as of matters of contract! See Cours de Droit Public, par Le Comm. S. Pinheiro-Ferreira, Paris, 1830, tome ii. pp. 24–34, Revue Etrangère de Législation, et d'Economie Politique, No. 2, Paris, December, 1833. Some other foreign jurists, of more established reputation, maintain the same doctrine, and hold that crimes committed in one state may, if the criminal be found in another state, be, upon demand, punished there. Hurtius, de Collis. Leg. P. Voet, de Statut. cited in Story's Comm. Conflict of Laws, 516–520. Martens's Law of Nations, b. 3, c. 3, sec. 22, 23. Grotius de Jure B. & P. b. 2, c. 21, sec. 4. The latter says, that every government is bound to punish the fugitive criminal on demand, or deliver him up. But the better opinion now is, both on principle and authority, that the prosecution and punishment of crimes are left exclusively to the tribunals of the country where they are committed. Kaimes's Princip. of Equity, vol. ii. 326. Merlin, Répertoire, Souveraineté, sect. 5, n. 7, pp. 757, 758. Pardessus, Droit Comm. tome v. art. 1467. If, indeed, the fugitive is to be tried and punished for a crime committed out of the territory, the punishment must be according to the law of the place where the offence was committed. *Delicta puniuntur juxta mores loci commissi delicti, et non loci ubi de crimine cognoscitur.* Bartholus, cited in Henry on Foreign Law, 47. It is, however, a decided and settled principle in the English and American law, that the penal laws of a country do not reach, in their disabilities, or penal effects, beyond the jurisdiction

[2] A convention for the mutual extradition of fugitives from justice was concluded between the United States and Bavaria, Sept. 12, 1853. It recites, as causes of extradition, murder, or assault with intent to commit murder, piracy, arson, robbery, forgery, the utterance of forged papers, the fabrication or circulation of counterfeit money, whether coin or paper, or the embezzlement of public moneys. See also the conventions with Prussia and other states of the Germanic Confederacy, June 16, 1852, and with the Kingdom of Hanover, Jan. 18, 1855, and with the Kingdom of the Two Sicilies, Oct. 1, 1855, and with the Swiss Confederation, Nov. 8, 1855, and with Austria, July 3, 1856, and with the Grand Duchy of Baden, Jan. 30, 1857, with France, Feb. 10, 1858, with Sweden and Norway, March 21, 1860, with Venezuela, Aug. 27, 1860, and with Mexico, Dec. 11, 1861. All these conventions embrace the crimes enumerated in that with Bavaria. Some of them also include rape, some burglary. Those with France, Venezuela, and the Swiss Confederation include embezzlement of private funds, by persons receiving hire or salary, when the crime is an infamous offence where it has been committed. That with Norway and Sweden includes mutiny, where the vessel is taken possession of by the mutineers. That with Mexico includes kidnapping, rape, mutilation, larceny to a value exceeding twenty-five dollars, and the introduction or fabrication of instruments for counterfeiting coin or paper money.

It is stipulated in most of these conventions, that neither of the contracting parties shall surrender its own citizens; and in several, that if the party demanded is under any criminal charge in the country where he is found, he may be held for trial, and if convicted, for punishment, notwithstanding the demand. Under none of these treaties or conventions can the extradition of persons charged with political offences be demanded.

and friendly intercourse, their persons, by the consent of all nations, have been deemed inviolable, and the instances are rare in which popular passions, or perfidious policy, have violated this immunity. Some very honorable examples of respect for the rights of ambassadors, even when their privileges would seem in justice to have been forfeited on account of the gross abuse of them, are to be met with in the ancient Roman annals, notwithstanding the extreme arrogance of their pretensions, and the intemperance of their military spirit. (*c*) If, however, ambassadors should be so regardless of their duty, and of the object of their privilege, as to insult or openly attack the laws or government of the nation to whom they are sent, their functions may be suspended by a refusal to treat with them, or application can be made to their own sovereign for their recall; or they may be dismissed, and required to depart within a reasonable time. (*d*) We have had instances, within our own times, of all these modes of dealing with ministers who had given offence, and it is not to be denied, that every government has a perfect right to judge for itself whether the language or conduct of a foreign minister be admissible. The writers on public law go still further, and allow force to be applied to confine or send away *an ambassador, when the safety of the state, which is superior to all other considerations, absolutely requires it, arising either from the violence of his conduct, or the influence and danger of his machinations. This is all that can be done, for ambassadors cannot, in any case, be made amenable to the civil or criminal jurisdiction of the country; and this has been the settled rule of public law, ever since the attempt made in the reign of Elizabeth to subject the Scotch and Spanish ambassadors to criminal jurisdiction, and the learned discussions which that case excited. (*a*)

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where they are established. Folliott *v.* Ogden, 1 H. Black. 123, 135. Lord Ellenborough, Wolff *v.* Oxholm, 6 M. & S. 99; Commonwealth of Massachusetts *v.* Green 17 Mass. 514, 539–543; Scoville *v.* Canfield, 14 Johns. 338, 440.

(*c*) Livy, b. 2, c. 4; b. 30, c. 25.

(*d*) In 1797, it was considered by the Attorney-General of the United States, in his letter to the Secretary of State, to be a contempt of the government, for a foreign minister, while a resident minister in the United States, to communicate his sentiments to the people of the United States through the press. His intercourse and correspondence of that kind is to be with the executive department of the government exclusively. Opinions of the Attorney-General, vol. i. 43.

(*a*) Grotius, b. 2, c. 18, sec. 4; Bynk. de Foro Legatorum, c. 8, 17, 18; Vattel, b. 4, c. 7, sec. 92–103; Ward's History, vol. ii. pp. 486–552; Marshall Ch. J., in the

By fiction of law, an ambassador is considered as if he were out of the territory of the foreign power; and it is an implied agreement among nations, that the ambassador, while he resides within the foreign state, shall be considered as a member of his own country, retaining his original domicil, and the government he represents has exclusive cognizance of his conduct and control of his person. (*b*) An ambassador is also deemed under the protection of the law of nations in his passage through the territories of a third and friendly power, while upon his public mission, in going to and returning from the government to which he is deputed. To arrest him under such circumstances would be a breach of his privileges as a public minister. (*c*) The attendants of the ambassador attached to his person, and the effects in his use, and the house in which he resides, and his domestic servants, are under his protection and privilege, and equally exempt from the foreign jurisdiction, though there are strong instances in which their inviolability has been denied and invaded. (*d*)[1] The

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case of the Schooner Exchange *v.* M'Faddon, 7 Cranch, 138; Mr. Wheaton, in his History of the Law of Nations in Europe and America, New York, 1845, pp. 236–261, has given an analysis or summary of Bynkershoek's treatise De Foro Legatorum, and which is justly regarded as an excellent work and of high authority. It is contained in the 2d volume of Bynkershoek's work, published in 2 volumes, folio, at Leyden, 1767.

(*b*) Grotius, b. 2, c. 18, sec. 1–6; Wicquefort, de l'Ambassadeur, liv. 1, sec. 27; Vattel, b. 4, c. 7, sec. 81–135; Bynk. de Foro Legat. c. 8. If an ambassador be concerned in trade, his property in that trade is liable to seizure, as in the case of any individual. Bynk. de Foro Legat. c. 14; Vattel, b. 4, c. 8.

(*c*) Vattel, b. 4, c. 7, sec. 63, 84; Holbrook *v.* Henderson, 4 Sandf. (N. Y.) 619. In this case, Henderson, the minister from the Republic of Texas to France, was arrested in New York for debt, while on his return from France to Texas, by the way of New York, and the court discharged him from the arrest. It was held that an entry into the country in time of peace did not require, for the protection of the person, a passport, though the law assumes that passports may be granted by the government of the United States. Act of Congress, April 30, 1790, sec. 27. Passports, though named in our law, are unknown in practice. The protection is implied by natural and municipal law, and it is the duty of the courts of justice, when cases arise before them, to enforce the law of nations on this subject, as part of the law of the land. The doctrine of international law, as laid down by Vattel, is founded in good sense and public policy, and sustained by the interests and courtesy of nations. Grotius says, b. 2, c. 18, sec. 5, that the obligation to protect ambassadors extends only to the power to whom the embassy is sent, and does not extend to the power through whose territories the ambassador presumes to pass without a passport. But that harsh and narrow rule is now justly exploded.

(*d*) Rutherforth, b. 2, c. 9; Ward's History, vol. ii. pp. 552, 553; Vattel, b. 4, c. 8,

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[1] An ambassador, who voluntarily submits to the jurisdiction of the court, cannot

distinction between ambassadors, ministers plenipotentiary, envoys extraordinary, and resident ministers relates to diplomatic precedence and etiquette, and not to their essential powers and privileges. (*e*)

*40 * A government may, in its discretion, lawfully refuse to receive an ambassador, and without affording any just cause

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sec. 113; United States *v.* Hand, 2 Wash. C. C. 435. Opinions of the Attorney-General of the United States, Washington, 1841, vol. i. 89–91. The immunities of a public minister are considered as not extending to debtors, as to debts incurred prior to their entering into the minister's service, nor to fugitive slaves, nor to persons who were under previous duties, as soldiers, sailors, apprentices, minors, a wife, &c., nor does the privilege of immunity protect a laborer engaged to work in the garden attached to the minister's residence. — Ib. The duties and privileges of a public minister are detailed at large by Mr. Wheaton, in his Elements of International Law, 3d edition, pp. 264–307, and afterwards in his larger work on the History of the Law of Nations in Europe and America, New York, 1845, pp. 236–261; and from his long residence at two of the European courts in a diplomatic character, his authority on the subject acquires additional force.

(*e*) Martens, pp. 201–207. Vattel, b. 4, c. 6. Chargé d'Affaires is a diplomatic representative or minister of the fourth grade; and a resident minister seems not to be equal to a minister plenipotentiary. Nor is a minister plenipotentiary of equal rank and dignity with an ambassador, who represents the person of his sovereign. The great powers, at the Congress of Vienna, in 1815, and of Aix la Chapelle, in 1818, by an arrangement, divided diplomatic agents into four classes: 1. Ambassadors, papal legates, or nuncios. 2. Envoys, ministers, and other agents accredited to the sovereigns. 3. Ministers resident, accredited to sovereigns. 4. Chargés d'affaires, accredited to the department of foreign relations. A minister extraordinary has not by that title any superiority of rank. The Comm. Pinheiro-Ferreira, the Portuguese publicist, and himself a ministre d'état, in his Cours de Droit Public, classes together chargés d'affaires, ministers resident, or simply ministers or residents, as diplomatic agents of the third class. The United States are usually represented at the courts of the great powers of the first class by ministers plenipotentiary, and at those of an inferior class by a chargé d'affaires; and they have never sent a person of the rank of ambassador in the diplomatic sense. The Prince of Orange once expressed to Mr. Adams his surprise that the United States had not put themselves, in that respect, on a level with the crowned heads. Diplomatic Correspondence, edited by Mr. Sparks, vol. vii. 108. The questions concerning precedence among the members of the diplomatic corps at foreign courts were all happily settled by the Congress of Vienna, in 1815, and signed by the representatives of the eight principal European powers. It was agreed that diplomatic agents of the respective classes take rank according to the date of the official notice of their arrival, and that the order of signature of ministers to acts or treaties between several powers that allow of the alternat, should be determined by lot. Recueil des Pièces Officielles, tom. viii. No. 17; Wheaton's Elements of International Law, p. 265; his History of the Law of Nations in Europe and America, New York, 1845, p. 496.

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afterward set up his privilege of exemption, to avoid a suit, in which the plaintiff does not interfere with his person or property. Taylor *v.* Best, 25 E. L. & Eq. 383.

for war, though the act would, probably, excite unfriendly disposition, unless accompanied with conciliatory explanations. The refusal may be upon the ground of the ambassador's bad character, or former offensive conduct, or because the special subject of the embassy is not proper, or not convenient for discussion. (*a*) A state may also be divided and distracted by civil wars, so as to render it inexpedient to acknowledge the supremacy of either party. Bynkershoek says, (*b*) that this right of sending ambassadors belongs to the ruling party, in whom *stet rei agendi potestas*. This is placing the right where all foreign governments place it, in the government *de facto*, which is in the actual exercise of power; but the government to whom the ambassador is sent may exercise its discretion in receiving or refusing to receive him.

It sometimes becomes a grave question, in national discussions, how far the sovereign is bound by the act of his minister. This will depend upon the nature and terms of his authority. (*c*) It is now the usual course for every government to reserve to itself the right to ratify or dissent from the treaty agreed to by its ambassador. A general letter of credence is the ordinary letter of attorney, or credential of the minister; and it is not understood to confer a power * upon the minister to bind his *41 sovereign conclusively. To do so important an act would require, at least, a distinct and special power, containing an express authority to bind the principal definitively, without the right of review, or the necessity of ratification on his part. (*a*) This is not the ordinary or prudent course of business. Ministers always act under instructions which are confidential, and which, it is admitted, they are not bound to disclose; (*b*) and it is a well-grounded custom, as Vattel observes, (*c*) that any engagement

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(*a*) Rutherforth, b. 2, c. 9; Bynk. de Foro Legatorum, c. 19, sec. 7.

(*b*) Quest. J. Pub. lib. 2, c. 3.

(*c*) The discretion and reserve with which a public minister ought to act in relation to the country in which he resides is strongly exemplified in the case of The Sally Ann, Stewart Vice-Adm. 367. It was held, that a license granted by the British Minister at New York, after the commencement of the war of 1812, to an American citizen, to export provisions to a British island, was inconsistent with his diplomatic character and duty, and void; and the decision was declared to be correct and proper, by the Lords Commissioners on appeal.

(*a*) Bynk. Q. Jur. Pub. lib. 2, c. 7.

(*b*) Wicquefort's L'Amb. tom. i. sec. 14; Martens, p. 217.

(*c*) B. 4, c. 6, sec. 77.

which the minister shall enter into is of no force among sovereigns, unless ratified by his principal. This is now the usage, although the treaty may have been signed by plenipotentiaries. (*d*)

Consuls.

Consuls are commercial agents, appointed to reside in the seaports of foreign countries, with a commission to watch over the commercial rights and privileges of the nation deputing them. The establishment of consuls is one of the most useful of modern commercial institutions. They were appointed about the 12th century, in the opulent states of Italy, such as Pisa, Lucca, Genoa, and Venice, and their origin has been ascribed to the necessity for extraordinary assistance in those branches of commerce formerly carried on with barbarous and uncivilized nations. (*e*) The utility of such a mercantile officer has been perceived and felt by all trading nations, and the Mediterranean trade in particular stands highly in need of such accredited agents. (*f*) Consuls have been multiplied and extended to every part of the world where navigation and commerce can successfully penetrate, and their duties and privileges are now generally limited and defined in treaties of commerce, or by
*42 the *statute regulations of the country which they represent. In some places they have been invested with judicial powers over disputes between their own merchants in foreign ports; but in the commercial treaties made by Great Britain there is rarely any stipulation for clothing them with judicial authority, except in treaties with the Barbary powers; and in England it has been held, that a consul is not strictly a judicial officer, and they have there no judicial power. (*a*) It has been urged by some writers, as a matter highly expedient, to establish

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(*d*) Bynk. *ubi supra;* Vattel, b. 2, c. 12, sec. 156; Martens, b. 2, c. 1, sec. 3; The Eliza Ann, 1 Dodson Adm. 244. Both Vattel and Klüber agree, that a treaty concluded under a full power, cannot, in honor, be rejected without very sufficient reasons, as by violation of instruction, mutual error, a moral or physical impossibility, &c. Wheaton's Elements, 3d edit. pp. 303–306. See, in Wheaton's Elements, 3d edit. p. 335, a reference to the most respectable writers on diplomatic history.

(*e*) 1 Chitty Comm. Law, 48, 49.

(*f*) Jackson on the Commerce of the Mediterranean, p. 30, c. 4. Consuls were not unknown to the ancient Athenians, and they had them in the commercial ports in which they traded, to protect the interests and property of Athenian merchants, St. John's History of the Manners and Customs of Ancient Greece, vol. iii. 282.

(*a*) Mansfield Ch. J., in Waldron *v.* Coombe, 3 Taunt. 162; 1 Chitty, 50, 51.

rules requiring merchants abroad to submit their disputes to the judicial authority of their own consuls, particularly with reference to shipping concerns. But no government can invest its consuls with judicial power over their own subjects in a foreign country, without the consent of the government of the foreign country, founded on treaty; and there is no instance in any nation of Europe of the admission of criminal jurisdiction in foreign consuls. (*b*)[1] The laws of the United States, on the subject of consuls and vice-consuls, (*c*) specially authorize them to receive the protests of masters and others relating to American commerce, and they declare that consular certificates, under seal, shall receive faith and credit in the courts of the United States.[2] It is likewise made their duty, where the laws of the country permit, to administer on the personal estates of American citizens, dying within their consulates, and having no legal representative, and to take charge of and secure the effects of stranded American vessels,

(*b*) Pardessus, Cours de Droit Comm. tom. v. sec. 1450, 1451, 5th edit.; Opinions of the Attorneys-General of the United States, vol. i. 786.

(*c*) Acts of Congress of 14th April, 1792, c. 24, and of February 28, 1803, c. 62.

[1] By an act of Congress of Aug. 11th, 1848, the commissioner and consuls of the United States, appointed to reside in China, are invested with high judicial powers as to crimes and misdemeanors committed by citizens of the United States in the dominions of China; and also with civil jurisdiction to execute the treaty stipulations between the two countries; and in matters of contract made or to be executed at or near the Chinese ports. The laws of the United States, and, where they are deficient, the common law, are extended to such jurisdictions; and if defects still remain, the commissioner may make decrees. The provisions of this act are extended to Turkey, and are there to be executed by the ministers and consuls.

See a paper by the late Attorney-General upon the Authority of Consuls in China. Opin. of Att'ys-Gen. vol. vii. p. 495.

It is stipulated by the convention between the United States and the Sultan of Borneo, that the American consul shall have exclusive jurisdiction of all cases, in which a citizen of the United States is charged with the commission of a crime in any part of the dominions of his Highness, the Sultan; and shall have power to decide, without any interference by the local authorities, all disputes or differences to which American citizens may be parties. 10 U. S. Stat. 909. And it is stipulated by the convention between the United States and Japan, that Americans committing offences in Japan shall be tried by the American consul-general or consul, and be punished according to American laws. 11 U. S. Stat. 723.

[2] Brown *v.* The Independence, Crabbe, 54. Johnson *v.* The Coriolanus, Crabbe, 239. No American consul is invested, by virtue of his office, with authority to exempt an enemy's vessel from confiscation or capture. The Amado, 1 Newberry Adm. 400.

in the absence of the master, owner, or consignee; and they are bound to provide for destitute seamen within their consulates, and to send them, at the public expense, to the United States. It is made the duty of American consuls and commercial agents, to reclaim deserters, and discountenance insubordination, and to lend their aid to the local authorities for that purpose, and to discharge the seamen cruelly treated. (*d*) It is also made the duty of masters of American vessels, on arrival at a foreign port, to deposit their registers, sea-letters, and passports with the consul, vice-consul, or commercial agent, if any, at the port, though this injunction only applies when the vessel shall have come to an entry, or transacted business at the port. (*e*) These particular powers and duties are similar to those prescribed by British
*43 consuls, and to consuls under the consular * convention between the United States and France, in 1788; and they are in accordance with the usages of nations, and are not to be construed to the exclusion of others, resulting from the nature of the consular appointment. (*a*) The consular convention between France and this country, in 1778, allowed consuls to exercise police over all vessels of their respective nations, "within the interior of the vessels," and to exercise a species of civil jurisdiction, by determining disputes concerning wages, and between the masters and crews of vessels belonging to their own country. The jurisdiction claimed under the consular convention with France was merely voluntary, and altogether exclusive of any coercive authority; (*b*) and we have no treaty at present which concedes

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(*d*) Act U. S. 20th July, 1840, c. 23, sec. 11, 17. See *infra*, vol. iii. 199, the treaty between the United States and Hanover, to the same effect.

(*e*) Toler *v.* White, Ware, 277; Matthews *v.* Offley, 3 Sumner, 115. American consuls having no judicial power cannot take cognizance of the offences of seamen in foreign ports, nor exempt the master from his own responsibility. The Wm. Harris, Ware, 367. But when an American vessel puts into a port of necessity for repairs, a survey to ascertain the damage may, it seems, according to usage, be directed by the American consul, as part of his official duty. Potter *v.* The Ocean Ins. Co. 3 Sumner, 27. The English Prerogative Court, before Sir Herbert Jenner, in 1839, in the case of Aspinwall *v.* The Queen's Proctor, 2 Curteis, 241, held, that an American consul was not, in that capacity, permitted by the law of England to administer upon the personal estate of a domiciled citizen of the United States dying in England. The Crown takes charge of the property in trust, for payment of debts and distribution, according to the law of the owner's domicil.

(*a*) Beawes's L. M. vol. i. tit. Consuls, pp. 292, 293.

(*b*) Mr. Pickering to Mr. Pinckney, January 16, 1797.

even such consular functions. (*c*)[1] The doctrine of our courts is, (*d*) that a foreign consul, duly recognized by our government, may assert and defend, as a competent party, the rights of property of the individuals of his nation, in the courts of the United States, and may institute suits for that purpose, without any special authority from the party for whose benefit he acts.[2] But the court, in that case, said that they could not go so far as to recognize a right in a vice-consul to receive actual restitution of the property, or its proceeds, without showing some specific power for the purpose, from the party in interest.

No nation is bound to receive a foreign consul, unless it has agreed to do so by treaty, and the refusal is no violation of the peace and amity between the nations. Consuls are to be approved and admitted in the usual form; and if any consul be guilty of illegal or improper conduct, he is liable to have his *exequatur*, or written recognition of his character, revoked, and to be punished according to the laws of the country in which he is consul; or he may be sent back to his own country, at the discretion of the government * which he has offended. The French con- *44

(*c*) By the treaties of commerce and navigation between the United States and the Kingdom of Hanover, May 20th, 1840, article 6, and between the United States and Portugal, of 23d April, 1841, it was provided that consuls, vice-consuls, and commercial agents should have the right, as such, to sit as judges and arbitrators in differences between the masters and crews of the vessels belonging to the nation whose interests were committed to their charge, without the interference of the local authorities, unless the conduct of the crews or of the captain should disturb the tranquillity of the country, or the consuls should require such assistance, to cause their decisions to be carried into effect or supported. By the same treaties, foreign consuls may apply for the arrest and surrender of seamen deserting from their public and private vessels in port. See, also, treaties to the like effect with Sweden, Prussia, and Russia.

(*d*) Case of The Bello Corrunes, 6 Wheaton, 168.

[1] But see the provisions of the consular convention, concluded between the United States and France, February 23, 1853, 10 U. S. Stat. 992, and also the treaties and consular conventions with San Salvador, Jan. 2, 1850, 10 U. S. Statutes, 397; with New Grenada, March 4, 1850, 10 U. S. Stat. 900; with Peru, July 26, 1851, 10 U. S. Stat. 944; with Bremen, Hamburg, and Lubeck, April 30, 1852, 10 U. S. Stat. 961; with the Netherlands, Jan. 22, 1855, 10 U. S. Stat. 1150; with the Two Sicilies, Oct. 1, 1855, 11 U. S. Stat. 650; with Belgium, July 17, 1858; and with Venezuela, Aug. 27, 1860.

[2] Ship Adolph, 1 Curtis C. C. 87. A consul cannot intervene in behalf of his sovereign, in a state where the sovereign has a resident minister or ambassador. Robson *v.* The Huntress, 2 Wall. Jr. C. C. 59.

suls are forbidden to be concerned in commerce, and, by the act of Congress of February 28, 1803, American consuls residing on the Barbary coast are forbidden also; but British and American consuls are generally at liberty to be concerned in trade; and in such cases the character of consul does not give any protection to that of merchant, when these characters are united in the same person. (*a*) Though the functions of a consul would seem to require that he should not be a subject of the state in which he resides, yet the practice of the maritime powers is quite lax on this point, and it is usual, and thought most convenient, to appoint subjects of the foreign country to be consuls at its ports.

A consul is not such a public minister as to be entitled to the privileges appertaining to that character, nor is he under the special protection of the law of nations. He is entitled to privileges to a certain extent, such as for safe-conduct, but he is not entitled to the *jus gentium*. Vattel thinks (*b*) that his functions require that he should be independent of the ordinary *criminal* jurisdiction of the country, and that he ought not to be molested,

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(*a*) Beawes's L. M. vol. i. tit. Consuls, p. 291; 1 Chitty, 57, 58; The Indian Chief, 3 Rob. Adm. 27; Vattel, b. 4, sec. 114; Arnold and Ramsay *v.* U. Ins. Co. 1 Johns. Cas. 363. The treaties of commerce and navigation between the United States and Hanover, May 20, 1840, art. 6, and between the United States and Portugal, of 23d of April, 1841, art. 10, afford a sample of the stipulation usual in commercial treaties on this subject: "If any of the said consuls shall carry on trade, they shall be subjected to the same laws and usages to which private individuals of their nation are subjected in the same place." American consuls abroad have no salaries, and are paid by fees of office, except the consul at London, who has a salary of $2,000. A suggestion was made in Congress in March, 1840, that it would be advisable to change our consular system in that respect, by confining consuls to their business of consuls, and to allow them salaries. The Secretary of State of the United States, in his report to Congress of the 12th December, 1846, strongly recommended a revision and amendment of the consular system of the United States; and that the number, appointment, and compensation of consuls be regulated, and their duties and fees defined. He recommended the establishment of consuls-general, especially in respect to the Barbary states, and some of the ports in the Levant; and he suggested a provision for 74 consuls and 55 vice-consuls, and also for consular agents; and that those in the more important ports be paid by salaries out of the public treasury, and with a prohibition to engage in mercantile pursuits. American consuls were generally commission merchants residing abroad; and foreign commerce ought not to be taxed with consular fees, except for limited purposes; and the fees ought to be regulated by the tonnage of the vessel. A consular code ought to define the powers and duties of consuls.

(*b*) B. 2, c. 2, sec. 34.

unless he violates the law of nations by some enormous crime; and that, if guilty of any crime, he ought to be sent home to be punished. (*c*) But no such immunities have been conferred on consuls by the modern practice of nations; and it may be considered as settled law, that consuls do not enjoy the protection of the law of nations, any more than other persons who enter the country under a safe-conduct. In civil and criminal cases they are equally subject to the laws of the country in which they reside. (*d*)[1] The same doctrine, declared by the public *jurists, has been frequently laid down in the English and *45 American courts of justice. (*a*) It seems, however, from some decisions in France, mentioned by Mr. Warden, (*b*) that foreign consuls cannot be prosecuted before a French tribunal, for acts done by them in France, by order of their government, and with the authorization of the French government, and that, in general, a consul cannot be prosecuted without the previous consent of his government. Consular privileges are much less extensive in Christian than in Mahometan countries. In the latter they cannot be imprisoned for any cause whatever, except by demanding justice against them of the Porte, (*c*) and they partake very considerably of the character and importance of resident ministers. They are diplomatic agents under the name of consuls, and enjoy the rights and privileges which the Ottoman Porte recognizes in relation to the foreign ministers resident at Constantinople. (*d*) By treaty, an entire immunity is usually given to the

(*c*) De Steck, Essai sur les Consuls, sec. 7, p. 62, Berlin, 1790, draws the same conclusion, from the commercial treaties in Europe since 1664.

(*d*) Wicquefort's L'Amb. b. 1, c. 5; Bynk. de Foro Legat. c. 10; Martens's Summ. b. 4, c. 3, sec. 8; Beawes's L. M. vol. i. tit. Consuls; Barbuit's case, Talbot's Cases, 281; Valin's Ord. vol. i. liv. 1, tit. 9, de Consuls; Pardessus, Droit Comm. tom. iv. 148, 183; Opinions of the Attorneys-General of the United States, vol. i. 45, 302. Washington, 1841.

(*a*) Viveash *v.* Becker, 3 Maule & Selw. 284; Clarke *v.* Cretico, 1 Taunt. 106; United States *v.* Ravara, 2 Dallas, 297; The Commonwealth *v.* Kosloff, 5 Serg. & Rawle, 545; De La Foret's case, 2 Nott & M'Cord, 217.

(*b*) On Consuls, pp. 108–116.

(*c*) 1 Chitty, 71.

(*d*) Calliere, de la Manière de Negocier avec les Souverains, part i. p. 94, London, edit. 1750. The whole Frank quarter of Smyrna is at this day under the jurisdiction

[1] A foreign consul's exemption from suit in a state court is a privilege which he can neither waive nor renounce. Valarino *v.* Thompson, 3 Seld. (N. Y.) 576; Griffin *v.* Dominguez, 2 Duer (N. Y.) 656.

persons, domestics, and effects of the resident consuls, and no consuls reside with the Barbary states but under the protection of treaties. (*e*)

Considering the importance of the consular functions, and the

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of European consuls, and all matters touching the rights of foreign residents fall under the exclusive cognizance of the respective consuls. So the consuls of Barcelona, in the middle ages, were clothed with many of the functions of modern resident ministers. In the negotiations of the American minister, Mr. Cushing, with the Chinese government, in 1844, the former observed, that in the intercourse between Christian and Mahometan states, the Christian foreigner was exempted from the jurisdiction of the local authorities, and subjected to the jurisdiction of the minister, consul, or other authorities of his own government. It was observed, in the Report of the Secretary of State, in 1846, already referred to, that by treaties of the United States with Turkey and China, offences committed by American citizens in those countries were to be tried and punished by the consuls; and the governments of the countries, when required, were to afford aid to enforce consular decisions.[1]

(*e*) Shaler's Sketches of Algiers, pp. 39, 307. By the treaty of amity and commerce between the United States and the Sultan of Muscat, in Arabia, ratified on the 30th of June, 1834, American consuls may be appointed to reside in the ports of the Sultan, where the principal commerce is carried on, (and which, of course, may include ports on the African coast, and in the Island of Zanzibar, within the domains of the Sultan.) Such consuls are to be exclusive judges of all disputes in suits wherein American citizens shall be engaged with each other, and to receive the property of American citizens dying within his dominions; and the persons and property of the consuls and of their households are to be inviolate. The consular establishment of the United States is very imperfect, and especially in relation to the countries in the East Indian regions. The claims of commerce, as well as the character of the United States, would seem to require that the functions of consuls, and the provision for their support, should be better regulated, and that they ought not to be left to the necessity of making their consular duties subsidiary to their business as merchants and factors. See a valuable plan in relation to consular establishments in the countries east of the Cape of Good Hope, in a pamphlet entitled "Outline of a Consular Establishment for the United States of America in Eastern Asia," and which is noticed in the North American Review for October, 1838, followed by some judicious reflections on the subject.[2]

Consuls residing in the five free ports of China, established by the treaty of peace between Great Britain and China, in 1842, have, by the subsequent commercial treaty in 1843, between those powers, enlarged consular functions, including those which are in some respects judicial and executive.

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[1] The *status* of consuls, by the law of nations, is clearly defined in an opinion by the late Attorney-General. Opin. of Att'ys-Gen. vol. vii. 342. The same paper contains a discussion of the validity of marriages performed by American consuls in foreign states. The subject is further examined in the same volume, p. 18. By the stat. 12 and 13 Vict. c. 68, valid marriages may be solemnized under the sanction of British consular officers.

[2] The act to regulate the Diplomatic and Consular System of the United States was passed Aug. 18, 1856. Its provisions, which explicitly define the functions and authority of consuls, embrace many of the important features suggested in the above and preceding notes.

activity which is required of them in all great maritime ports, and the approach which consuls make to the efficacy and dignity of diplomatic characters, it was a wise provision in the Constitution of the United States which gave to the Supreme Court original jurisdiction in all cases affecting consuls, as well as ambassadors and other public ministers; and the federal jurisdiction is understood to be exclusive of the state courts. (*f*)

(*f*) Commonweath *v.* Kosloff, 5 Serg. & Rawle, 545; Hall *v.* Young, 3 Pick. 80; Davis *v.* Packard, 7 Peters U. S. 276; Sartori *v.* Hamilton, 1 Green (N. J.) 107. See, also, *infra*, pp. 298, 304.[1]

[1] The jurisdiction of the courts of the United States is exclusive, if a foreign consul be a defendant, even though he is sued jointly with other persons. Naylor *v.* Hoffman, 22 How. Pr. R. 510.

LECTURE III.

OF THE DECLARATION, AND OTHER EARLY MEASURES OF A STATE OF WAR.

In the last Lecture we considered the principal rights and duties of nations in a state of peace: and if those duties were generally and duly fulfilled, a new order of things would arise, and shed a brighter light over the history of human affairs. Peace is said to be the natural state of man, and war is undertaken for the sake of peace, which is its only lawful end and purpose. (*g*) War, to use the language of Lord Bacon, (*h*) is one of the highest trials of right; for, as princes and states acknowledge no superior upon earth, they put themselves upon the justice of God by an appeal to arms. The history of mankind is an almost uninterrupted narration of a state of war, and gives color to the extravagant theory of Hobbes, (*i*) who maintains, that the natural state of man is a state of war of all against all; and it adds plausibility to the conclusions of those other writers, who, having known and studied the Indian character, insist that continual war is the natural instinct and appetite of man in a savage state. It is doubtless true, that a sincere disposition for peace, and a just appreciation of its blessings, are the natural and necessary result of science and civilization.

*48 Self-defence. *The right of self-defence is part of the law of our nature, and it is the indispensable duty of civil society to protect its members in the enjoyment of their rights, both of person and property. This is the fundamental principle of the social compact. An injury either done or threatened to the perfect rights of the nation, or of any of its members, and susceptible of no other redress, is a just cause of war. The injury may consist, not only in the direct violation of personal or political rights, but in wrongfully withholding what is due, or in the

(*g*) Cic. de Off. 1, 11 and 23; Grotius, b. 1, c. 1; Burlamaqui, part 4, c. 1, sec. 4; Vattel, b. 4, c. 1.

(*h*) Bacon's Works, vol. iii. p. 40.

(*i*) Leviathan, part 1, c. 13.

refusal of a reasonable reparation for injuries committed, or of adequate explanation or security in respect to manifest and impending danger. (*a*) Grotius condemns the doctrine that war may be undertaken to weaken the power of a neighbor, under the apprehension that its further increase may render him dangerous. This would be contrary to justice, unless we were morally certain, not only of a capacity, but of an actual intention to injure us. We ought rather to meet the anticipated danger by a diligent cultivation and prudent management of our own resources. We ought to conciliate the respect and good will of other nations, and secure their assistance, in case of need, by the benevolence and justice of our conduct. War is not to be resorted to without absolute necessity, nor unless peace would be more dangerous and more miserable than war itself. An injury to an individual member of a state is a just cause of war, if redress be refused; but a nation is not bound to go to war on so slight a foundation; for it may of itself grant indemnity to the injured party, and if this cannot be done, yet the good of the whole is to be preferred to the welfare of a part. (*b*) Every milder method of redress is to be tried, before the nation makes an appeal to arms; and this is the sage and moral precept of the writers on natural law.

* If the question of right between two powers be in any *49
degree dubious, they ought to forbear proceeding to extremities, and a nation would be condemned by the impartial voice of mankind, if it voluntarily went to war upon a claim of which it doubted the legality. But, on political subjects, we cannot expect, and are not to look for the same rigorous demonstration as in the physical sciences. Policy is a science of calculations and combinations, arising out of times, places, and circumstances, and it cannot be reduced to absolute simplicity and certainty. We must act according to the dictates of a well-informed judgment, resting upon a diligent and careful examination of facts; and every pacific mode of redress is to be tried faithfully and perseveringly, before the nation resorts to arms.

If one nation be bound by treaty to afford assistance, in case of war between its ally and a third power, the assistance is to be given whenever the *casus fœderis* occurs; but

Assistance by treaty.

(*a*) Grotius, b. 2, c. 1 and 22; Rutherforth, b. 2, c. 9; Vattel, b. 3, c. 3, sec. 26.
(*b*) Grotius, b. 2, c. 22–25; Rutherforth, b. 2, c. 9.

a question will sometimes arise, whether the government, which is to afford the aid, is to judge for itself of the justice of the war on the part of the ally, and to make the right to assistance depend upon its own judgment. Grotius is of opinion, (*a*) that treaties of that kind do not oblige us to participate in a war, which appears to be manifestly unjust on the part of the ally; and it is said to be a tacit condition annexed to every treaty made in time of peace, and stipulating to afford succors in time of war, that the stipulation is only to apply to a just war. To give assistance in an unjust war on the ground of the treaty, would be contracting an obligation to do injustice, and no such contract is valid. (*b*) But to set up a pretext of this kind to avoid a positive engagement is extremely hazardous, and it cannot be done, except in a very clear case, without exposing the nation to the imputation of a breach of public faith. In doubtful cases, the presumption ought rather to be in favor of our ally, and of the justice of the war.

*50 * The doctrine that one nation is not bound to assist another, under any circumstances, in a war clearly unjust, is similar to the principle in the feudal law, to be met with in the Book of Feuds, compiled from the usages of the Lombards, and forming part of the common law of Europe during the prevalence of the feudal system. A vassal refusing to assist his liege lord in a just war, forfeited his feud. If the justice of the war was even doubtful, or not known affirmatively to be unjust, the vassal was bound to assist; but if the war appeared to him to be manifestly unjust, he was under no obligation to help his lord to carry it on offensively. (*a*)

A nation, which has agreed to render assistance to another, is not obliged to furnish it when the case is hopeless, or when giving the succors would expose the state itself to imminent danger. Such extreme cases are tacit exceptions to the obligation of the treaty; but the danger must not be slight, remote, nor contingent, for this would be to seek a frivolous case to violate a solemn engagement. (*b*) In the case of a defensive alliance, the condition of the contract does not call for the assistance, unless the ally be

(*a*) B. 2, c. 25.
(*b*) Vattel, b. 2, c. 12, sec. 168; b. 3, c. 6, sec. 86, 87.
(*a*) Feud. lib. 2, tit. 28, sec. 1.
(*b*) Vattel, b. 3, c. 6, sec. 92.

engaged in a *defensive* war; for in a defensive alliance, the nation engages only to defend its ally, in case he be attacked, and even then we are to inquire whether he be not justly attacked. (*c*) The defensive alliance applies only to the case of a war first commenced, in point of fact, against the ally; and the power that first declares, or actually begins the war, makes what is deemed, in the conventional law of nations, an *offensive war*. (*d*) The treaty of alliance between France and the United States, in 1778, was declared, by the second article, *to be a *defensive* *51 alliance, and that declaration gave a character to the whole instrument; and consequently, the guaranty, on the part of the United States, of the French possessions in America, could only apply to future *defensive* wars on the part of France. Upon that ground, the government of this country, in 1793, did not consider themselves bound to depart from their neutrality, and to take part with France in the war in which she was then engaged. (*a*) The war of 1793 was first actually declared and commenced by France, against all the allied powers of Europe, and the nature of the guaranty required us to look only to that fact. (*b*)

In the ancient republics of Greece and Italy, the right of declaring war resided with the people, who retained, in their collective capacity, the exercise of a large portion of the sovereign power. Among the ancient Germans it belonged also to the popular assemblies, (*c*) and the power was afterwards continued

Declaration of war.

(*c*) Vattel, b. 3, c. 6, sec. 79, 83, 90.

(*d*) A war may be *defensive* in its principles, though *offensive* in its operations; as where attack is the best mode to repel a menaced invasion, and the *casus fœderis* of a *defensive* alliance will apply. He who first renders the application of force necessary is the aggressor, though he may not be the one who first actually applies it. Vattel, b. 3, c. 6, sec. 91, 100. Edin. Review, No. 39, pp. 244, 245.

(*a*) See Pacificus, written in 1793, by Mr. Hamilton, then Secretary of the Treasury; and see the Instructions from the Secretary of State to the American Ministers to France, July 15th, 1797.

(*b*) Several instances are mentioned in Wheaton's Elements of International Law, 3d edit. 325–334, of the occurrence of the *casus fœderis* in the case of a defensive alliance. A distinction is made, in the later writers on public law, between the *law of nations* and *international law*, originating, it is said, with Jeremy Bentham. Thus Mr. Wheaton calls one of his works the History of the Law of Nations, and the other, Elements of International Law. Chancellor d'Aguesseau long ago noticed the distinction between *Jus inter Gentes* and *Jus Gentium inter Civitates*. *International* law seems to relate more particularly to rights and duties arising from social, commercial, and pacific intercourse between different nations, and may be subdivided into public and private international law.

(*c*) Tacit. de M. G. c. 11.

in the same channel, and actually resided in the Saxon Witten-agemote. (*d*) But in the monarchies of Europe, which arose upon the ruins of the feudal system, this important prerogative was generally assumed by the king, as appertaining to the duties of the executive department of government. Many publicists (*e*) consider the power as a part of the sovereign authority of the state, of which the legislative department is an essential branch. There are, however, several exceptions to the generality of this position; for in the limited monarchies of England, France, and Holland, the king alone declares war, and yet the power, to apply an observation of Vattel to the case, is but a slender prerogative of the crown, if the parliaments or legislative bodies of those kingdoms will act independently, since the king cannot raise the
* 52 money requisite to carry on * the war without their consent.

The wild and destructive wars of Charles XII. led the states of Sweden to reserve to themselves the right of declaring war; and in the form of government adopted in Sweden, in 1772, (*a*) the right to make war was continued in the same legislative body. This was the provision in those ephemeral constitutions which appeared in Poland and France the latter part of the last century; and as evidence of the force of public opinion on this subject, it may be observed, that in the constitution proposed by Bonaparte, on his re-ascension of the throne of France, in 1815, the right to levy men and money for war was to rest entirely upon a law to be proposed to the House of Representatives of the people, and assented to by them. In this country, the power of declaring war, as well as of raising the supplies, is wisely confided to the legislature of the Union; and the presumption is, that nothing short of a strong case deeply affecting our essential rights, and which cannot receive a pacific adjustment, after all reasonable efforts shall have been exhausted, will ever prevail upon Congress to declare war.

It has been usual to precede hostilities by a public declaration

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(*d*) Millar's View of the English Government, b. 1, c. 7. In the capitulation or great charter, signed by Christopher II., King of Denmark, on his election to the throne in 1319, by the diet or assembly of the nobles, it was, among other things, declared that he should not make war without the advice and consent of the prelates and best men of the kingdom. Bishop Muller's Ancient History and Constitution of Denmark, reviewed in the Foreign Quarterly Review, No. 21.

(*e*) Puff. b. 8, c. 6, sec. 10; Vattel, b. 3, c. 1, sec. 4.

(*a*) Art. 48. But this free constitution of Sweden was overturned before the end of the year 1772, and a simple despotism established in its stead.

communicated to the enemy. It was the custom of the ancient Greeks and Romans to publish a declaration of the injuries they had received, and to send a herald to the enemy's borders to demand satisfaction, before they actually engaged in war; and invasions without notice were not looked upon as lawful. (*b*) War was declared with religious preparation and solemnity. According to Ulpian, (*c*) they *alone were reputed enemies *53 against whom the Roman people had publicly declared war. During the middle ages, a previous declaration of war was held to be requisite, by the laws of honor, chivalry, and religion. Louis IX. refused to attack the Sultan of Egypt until he made a previous declaration to him by a herald at arms; and one of his successors sent a herald, with great formality, to the governor of the Low Countries, when he declared war against Spain, in 1635. (*a*) But, in modern times, the practice of a solemn declaration made to the enemy has fallen into disuse, and the nation contents itself with making a public declaration of war within its own territory, and to its own people. The jurists are, however, divided in opinion, in respect to the necessity or justice of some previous declaration to the enemy in the case of offensive war. Grotius (*b*) considers a previous demand of satisfaction, and a declaration, as requisite to a solemn and lawful war; and Puffendorf (*c*) holds acts of hostility, which have not been preceded by a formal declaration of war, to be no better than acts of piracy and robbery. Emerigon (*d*) is of the same opinion; and he considered the hostilities exercised by England, in the year 1755, prior to any declaration of war, to have been in contempt of the law of nations, and condemned by all Europe. Vattel strongly recommends (*e*) a previous declaration of war, as being required by justice and humanity; and he says, that the fecial law of the Romans gave such moderation and religious solemnity to a preparation of war, and

(*b*) Potter's Antiquities of Greece, b. 3, c. 7; Livy, b. 1, c. 32; Cic. de Off. b. 1, c. 11; De Repub. lib. 3.

(*c*) Dig. 49, 15, 24. Cicero says, that under the Roman kings it was instituted law, that the war was unjust and impious, unless declared and proclaimed by the heralds under religious sanction. De Repub. lib. 2, 17.

(*a*) Emerigon, Traité des Ass. p. 561.

(*b*) B. 1, c. 3, sec. 4.

(*c*) B. 8, c. 6, sec. 9.

(*d*) Traité des Ass. tom. 1, p. 563.

(*e*) B. 3, c. 4, sec. 51.

bore such marks of wisdom and justice, that it laid the solid foundation of their future greatness.

Bynkershoek has devoted an entire chapter to this ques-
*54 tion, (*f*) *and he maintains that a declaration of war is not requisite by the law of nations, and that though it may very properly be made, it cannot be required as a matter of right. The practice rests entirely on manners and magnanimity, and it was borrowed from the ancient Romans. All that he contends for is, that a demand of what we conceive to be due should be previously made. We are not bound to accompany that demand with threats of hostility, or to follow it with a public declaration of war; and he cites many instances to show, that within the last two centuries wars have been frequently commenced without a previous declaration. Since the time of Bynkershoek, it has become settled by the practice of Europe, that war may lawfully exist by a declaration which is unilateral only, or without a declaration on either side. It may begin with mutual hostilities. (*a*) After the peace of Versailles, in 1763, formal declarations of war of any kind seem to have been discontinued, and all the necessary and legitimate consequences of war flow at once from a state of public hostilities, duly recognized, and explicitly announced, by a domestic manifesto or state paper. In the war between England and France, in 1778, the first public act on the part of the English government was recalling its minister, and that single act was considered by France as a breach of the peace between the two countries. There was no other declaration of war, though each government afterwards published a manifesto in vindication of its claims and conduct. The same thing may be said of the war which broke out in 1793, and again in 1803; and, indeed, in the war of 1756, though a solemn and formal declaration of war, in the ancient style, was made in June, 1756, vigorous hostilities had been carried on between England and France for a year preceding. In the war declared by the United States against Eng-
land, in 1812, hostilities were immediately commenced on
*55 our part *as soon as the act of Congress was passed, without waiting to communicate to the English government any notice of our intentions.

(*f*) Quæst. J. Pub. b. 1, c. 2.
(*a*) Sir Wm. Scott, 1 Dod. Adm. 247.

But, though a solemn declaration, or previous notice to the enemy, be now laid aside, it is essential that some formal public act, proceeding directly from the competent source, should announce to the people at home their new relations and duties growing out of a state of war, and which should equally apprise neutral nations of the fact, to enable them to conform their conduct to the rights belonging to the new state of things. War, says Vattel, (*b*) is at present published and declared by manifestoes. Such an official act operates from its date to legalize all hostile acts, in like manner as a treaty of peace operates from its date to annul them. As war cannot lawfully be commenced on the part of the United States without an act of Congress, such an act is, of course, a formal official notice to all the world, and equivalent to the most solemn declaration.

When war is duly declared, it is not merely a war between this and the adverse government in their political characters. Every man is, in judgment of law, a party to the acts of his own government, and a war between the governments of two nations is a war between all the individuals of the one and all the individuals of which the other nation is composed. Government is the representative of the will of all the people, and acts for the whole society. This is the theory in all governments; and the best writers on the law of nations concur in the doctrine, that when the sovereign of a state declares war against another sovereign, it implies that the whole nation declares war, and that all the subjects of the one are enemies to all the subjects of the other. (*c*) [1] Very important consequences concerning the obligations of subjects are deducible from this principle.

State of war binds subjects.

* When hostilities have commenced, the first objects that naturally present themselves for detention and capture are the persons and property of the enemy found within the territory on the breaking out of the war. According

*56

Enemy's property within the country.

(*b*) B. 3, c. 4, sec. 64.

(*c*) Grotius, b. 3, c. 4, sec. 9; c. 4, sec. 8; Burlamaqui, part 4, c. 4, sec. 20; Vattel, b. 3, c. 5, sec. 70.

[1] The doctrine of the text has been decided to be applicable to the citizens of the United States within the territory actually controlled by the Rebels in the present civil war; so that the United States may lawfully apply to them the rules which belong to their relation of disobedient citizens, or of public enemies, or both, as occasion demands. The Prize Causes, 2 Black U. S. 635.

to strict authority, a state has a right to deal as an enemy with persons and property so found within its power, and to confiscate the property, and detain the persons as prisoners of war. (*a*) No one, says Bynkershoek, ever required that notice should be given to the subjects of the enemy, to withdraw their property, or it would be forfeited. The practice of nations is, to appropriate it at once, without notice, if there be no special convention to the contrary. But though Bynkershoek lays down this, as well as other rules of war, with great harshness and severity, he mentions several instances, arising in the 17th, and one as early as the 15th century, of stipulations in treaties, allowing foreign subjects a reasonable time after the war breaks out to recover and dispose of their effects, or to withdraw them. Such stipulations have now become an established *formula* in commercial treaties. (*b*) [1] Emerigon (*c*) considers such treaties as an affirmance of common right, or the public law of Europe, and the general rule laid down by some of the latter publicists is in conformity with that provision. (*d*) The sovereign who declares war, says Vattel, can neither detain those subjects of the enemy who are in his dominions at the time of the declaration of war, nor their effects. They came into the country under the sanction of public faith. By per-
* 57 mitting them to enter his territories, and continue * there, the sovereign tacitly promised them protection and security for their return. He is, therefore, to allow them a reasonable time to retire with their effects, and if they stay beyond the time, he has a right to treat them as disarmed enemies, unless detained by sickness, or other insurmountable necessity, and then they are to be allowed a further time. It has been frequently provided by treaty, that foreign subjects should be permitted to remain, and continue their business, notwithstanding a rupture between the

(*a*) Grotius, b. 3, c. 9, sec. 4; c. 21, sec. 9; Bynk. Quæst. J. Pub. c. 2 and 7; Martens, b. 8, c. 2, sec. 5.

(*b*) A liberal provision of this kind is inserted in the treaty of amity and commerce between the United States and the Republic of Colombia, which was ratified at Washington, May 27, 1825, and between the United States and the Republic of Venezuela, by the treaty of friendship and commerce in May, 1836.

(*c*) Tom. i. p. 567.

(*d*) Vattel, b. 3, c. 4, sec. 63; Azuni, part 2, c. 4, art. 2, sec. 7; Le Droit Public de l'Europe, par Mably, Œuvres, tom. vi. p. 334; Burlamaqui, part 4, c. 7, sec. 6.

[1] See our treaties with Peru, Guatemala, and Costa Rica, 10 U. S. Stat.

governments, so long as they conducted innocently; and when there was no such treaty, such a liberal permission has been often announced in the very declaration of war. (*a*) Sir Michael Foster (*b*) mentions several instances of such declarations by the King of Great Britain, and he says, that aliens were thereby enabled to acquire personal chattels, and to maintain actions for the recovery of their personal rights, in as full a manner as alien friends.

Besides those stipulations in treaties, which have softened the rigors of war by the civilizing spirit of commerce, many governments have made special provision, in their own laws and ordinances, for the security of the persons and property of enemy's subjects, found in the country at the commencement of war. (*c*)

It was provided by Magna Charta, (*d*) that upon the breaking out of war, foreign merchants found in England, and belonging to the country of the enemy, should be attached, "without harm of body or goods," until it should be known how English merchants were treated by the enemy; "and if our *mer- *58
chants, said the charter, "be safe and well treated there, theirs shall be likewise with us." It has been deemed extraordinary, that such a liberal provision should have found a place in a treaty between a feudal king and his barons; and Montesquieu (*a*) was struck with admiration at the fact, that a protection of that kind should have been made one of the articles of English liberty. But this provision was confined to the effects of alien merchants who were within the realm at the commencement of the war, and it was understood to be confined to the case of merchants domiciled there. (*b*) It was accompanied, also, with one very ominous qualification; and it was at least equalled, if not greatly

(*a*) Vattel, b. 3, c. 4, sec. 63. See the treaty of commerce between the United States and the Republic of Chili, May, 1823, art. 23, which affords that permanent protection.[1]

(*b*) Discourse of High Treason, pp. 185, 186.

(*c*) By the Spanish decree of February, 1829, making Cadiz a free port, it was declared, that in the event of war, foreigners who had established themselves there for the purposes of commerce, and becoming alien enemies by means of war, were to be allowed a proper time to withdraw, and their property was to be sacred from all sequestration or reprisal.

(*d*) Ch. 30.

(*a*) Esprit des Lois, 20, 14.

(*b*) 1 Hale's P. C. 93.

[1] And see the treaty with the Argentine Confederation, July 27, 1853.

excelled, by an ordinance of Charles V. of France, a century afterwards, which declared that foreign merchants who should be in France at the time of the declaration of war should have nothing to fear, for they should have liberty to depart freely with their effects. (*c*) The spirit of the provision in Magna Charta was sustained by a resolution of the judges, in the time of Henry VIII., when they resolved, that if a Frenchman came to England before the war, neither his person nor goods should be seized. (*d*) The statute of staples, of 27 Edw. III. c. 17, made a still more liberal and precise enactment in favor of foreign merchants, residing in England, when war commenced between their prince and the king of England. They were to have convenient warning of forty days, by proclamation, to depart the realm with their goods; and if they could not do it within that time, by reason of accident, they were to have forty days more to pass with their merchandise, and with liberty, in the mean time, to sell the same. The act of Congress of the 6th of July, 1798, c. 73, was dictated by the same humane and enlightened policy. It authorized the Presi-
*59 dent, in *case of war, to direct the conduct to be observed towards subjects of the hostile nation, being aliens, and within the United States, and in what cases, and upon what security, their residence should be permitted; and it declared, in reference to those who were to depart, that they should be allowed such reasonable time as might be consistent with the public safety, and according to the dictates of humanity and national hospitality, "for the recovery, disposal, and removal of their goods and effects, and for their departure."

Right of confiscation of enemy's property.

But however strong the current of authority in favor of the modern and milder construction of the rule of national law on this subject, the point seems to be no longer open for discussion in this country; and it has become definitively settled, in favor of the ancient and sterner rule, by the Supreme Court of the United States. (*a*) The effect of war upon British property found in the United States, on land, at the commencement of the war, was learnedly discussed and thoroughly considered, in the case of Brown; and the Circuit Court of the United States, at Boston,

(*c*) Henault's Abreg. Chron. tom. i. 338.

(*d*) Bro. tit. Property, pl. 38; Jenk. Cent. 201, case 22.

(*a*) Brown *v.* The United States, 8 Cranch, 110. See, also, Ibid. 228, 229.

decided, (*b*) as upon a settled rule of the law of nations, that the goods of the enemy found in the country, and all the vessels and cargoes found afloat in our ports, at the commencement of hostilities, were liable to seizure and confiscation; and the exercise of the right rested in the discretion of the sovereign of the nation. When the case was brought up, on appeal, before the Supreme Court of the United States, the broad principle was assumed that war gave to the sovereign full right to take the persons, and confiscate the property of the enemy wherever found; and that the mitigations of this rigid rule, which the wise and humane policy of modern times had introduced into practice, might, more or less, affect the exercise of the right, but could not impair the right itself. Commercial nations have always considerable property in * the possession of their neighbors; and, when war * 60 breaks out, the question, what shall be done with the enemy's property found in the country, is one rather of policy than of law, and is one properly addressed to the consideration of the legislature, and not to the courts of law. The strict right of confiscation of that species of property existed in Congress, and without a legislative act authorizing its confiscation, it could not be judicially condemned; and the act of Congress of 1812, declaring war against Great Britain, was not such an act. Until some statute, directly applying to the subject, be passed, the property would continue under the protection of the law, and might be claimed by the British owner at the restoration of peace.[1]

Though this decision established the right, contrary to much of modern authority and practice, yet a great point was gained over the rigor and violence of the ancient doctrine, by making the exercise of the right to depend upon a special act of Congress.[2]

The practice, so common in modern Europe, of imposing em-

(*b*) The Cargo of the Ship Emulous, 1 Gallison, 563.

[1] Schooner Juanita, 1 Newberry Adm. 352.

[2] The generous policy, respecting enemy property, which was adopted by the belligerent powers in the late Russian war, is illustrated by the Order in Council of the British Government of the 15th of April, which was communicated to the American Secretary of State, May 9, 1854. See Cong. Doc. 33 Cong. 1 Sess. H. R. No. 103, p. 5. It was ordered that all Russian merchant ships, which had sailed, before the 15th of May, from any Russian port in the Baltic or White Seas, should be permitted to enter any port in her Majesty's dominions, discharge their cargoes, depart without molestation, and continue their voyages to any port not blockaded.

Hostile embargoes.

bargoes at the breaking out of hostilities, has, apparently, the effect of destroying that protection to property, which the rule of faith and justice gives to it, when brought into the country in the course of trade, and in the confidence of peace. Sir William Scott, in the case of The Boedes Lust, (*a*) explains this species of embargo to be an act of a hostile nature, and amounting to an implied declaration of war, though liable to be explained away and annulled, by a subsequent accommodation between the nations. The seizure is an act at first equivocal, as to the effect, though hostile in the mere execution, and if the matter in dispute terminates in reconciliation, the seizure becomes a mere civil embargo; but if it terminates otherwise, the subsequent hostilities have a retroactive effect, and render the embargo a hostile measure, *ab initio*. The property detained is deemed enemy's property, and liable to condemnation. This

* 61 * species of reprisals for some previous injury is laid down in the books as a lawful measure, according to the usage of nations; but it is often reprobated; and it cannot well be distinguished from the practice of seizing property found within the territory upon the declaration of war. It does not differ in substance from the conduct of the Syracusans, in the time of Dionysius the elder, (and which Mitford considered to be a gross violation of the law of nations,) for they voted a declaration of war against Carthage, and immediately seized the effects of Carthaginian traders in their warehouses, and Carthaginian richly laden vessels in their harbor, and sent a herald to Carthage to negotiate. (*a*) But this act of the Syracusans, near four hundred years before the Christian era, was no more than what is the ordinary practice in England, according to the observation of Lord Mansfield, in *Lindo* v. *Rodney*. (*b*) "Upon the declaration of war, or hostilities, all the ships of the enemy," he says, "are detained in our ports, to be confiscated as the property of the enemy, if no reciprocal agreement is made."

Letters of marque and reprisal.

Reprisals by commission, or letters of marque and reprisal, granted to one or more injured subjects, in the name and by the authority of a sovereign, is another mode of redress for some specific injury, which is considered to be

(*a*) 5 Rob. Adm. 233.

(*a*) Mitf. Hist. of Greece, vol. v. 402–404.

(*b*) Doug. 613.

compatible with a state of peace, and permitted by the law of nations. The case arises when one nation has committed some direct and palpable injury to another, as by withholding a just debt, or by violence to person or property, and has refused to give any satisfaction. The reprisals may be made in support of the rights of a subject, as well as those of the sovereign, and for the acts of the subject as well as for those of the sovereign. The commission is not to be issued except in a case clearly just, — *in re minime dubia;* and it authorizes the seizure of the property of the subjects as well as of the sovereign of the offending nation, and to bring it in to be detained as a pledge, or disposed of under judicial sanction, in like manner as if it were a process of distress under national authority for some debt or duty withheld. (*c*) These letters of reprisal, as being applicable to a state of peace, have been frequently recognized and regulated by treaty. (*d*) The French ordinance of the marine of 1681, (*e*) regulates minutely this remedial process, and the judicial sanction requisite to the proceedings under letters of reprisal, and which Valin considers to

(*c*) Bynk. Q. J. Pub. c. 24; Vattel, b. 2, c. 18, sec. 342, 344, 347, 353; Puff. Droit des Gens, par Barbeyrac, b. 8, c. 6, sec. 13, n. 1; Valin, Comm. tom. ii. tit. des Lettres de Marque, pp. 414, 416; Traité des Prises, p. 331; Emerigon, Traité des Ass. vol. i. 569; Message of the President of the United States to Congress, December 1, 1834. The right of government to enforce the just claims of its subjects against a foreign government, for debts duly contracted and unjustly withheld, is not to be questioned. It is admitted by statesmen and jurists, and was so stated by Lord Palmerston in the British Parliament, in July, 1847, that governments had a right to enforce by reprisals the claims of their subjects for debts against the subjects of other governments, if relief be denied by the non-execution or the improper administration of the laws in the foreign courts. Protection is due from government to its subjects in their persons and property; but the interference on the part of government to enforce that duty must always be a question of expediency. The government of the United States expressly acknowledged, and in one or more instances acted upon that principle. President Jackson, in 1834, suggested such a measure against France; and in 1847, one ground of the war between the United States and Mexico was the non-payment by Mexico of debts due to American citizens. By act of Congress, approved March 3, 1863, (ch. 85) the President was authorized, in all domestic and foreign wars, to issue to private armed vessels of the United States commissions, or letters of marque and general reprisal, in such form as he should think proper, and under the seal of the United States; the authority to cease at the end of three years from the date of the act. No such commissions or letters have been issued.

(*d*) See, for this purpose, the treaty of Munster, between Spain and Holland, in 1648; the treaties between England and Holland, in 1654 and 1667; the treaty of Ryswick, art. 9; the treaty of Utrecht, art. 16; treaty between the United States and the Republic of Colombia, in 1825.

(*e*) Liv. 3, tit. 10, des Réprisailles.

be sage precautions, proper to temper the rigor of this perilous mode of redress. (*f*) General reprisals upon the persons and property of the subjects of another power are equivalent to open war; but these special letters of marque and reprisal, limited to a specific object, are spoken of generally, and even in the articles of confederation of the United States, in 1781, (*g*) as issuing "in times of peace." They are, however, regarded by Barbeyrac, Emerigon, and other publicists, as a species of hostility, an imperfect war, and usually a prelude to open hostilities. The favorable or adverse issue of the hazardous experiment will depend, in some degree, upon the matter in demand, and, in a much greater degree, upon the relative situation, character, strength, and spirit of the nations concerned. (*h*)

* 62 * The claim of a right to confiscate debts, contracted by individuals in time of peace, and which remain due to subjects of the enemy at the declaration of war, rests very much upon the same principles as that concerning enemy's tangible property, found in the country at the opening of the war; though I think the objection to the right of confiscation, in this latter case, is much stronger. In former times, the right to confiscate debts was admitted as a doctrine of national law, and Grotius, Puffendorf, and Bynkershoek pronounced in favor of it. (*a*) It had the countenance of the civil law; (*b*) and even Cicero, in his Offices, (*c*) when stating the cases in which prom-

Confiscation of debts.

(*f*) In the time of Edward II., and for some succeeding reigns, the power of granting letters of marque and reprisal against the subjects of a foreign state, that refused to render justice to the subjects of the crown of England, was vested in the Court of Chancery. It was in the nature of a judicial process and of a private remedy. The capture was in the nature of a security to obtain justice. Lord Campbell, Lives of the Lord Chancellors, vol. i. 205.

(*g*) Art. 9.

(*h*) War does not exist merely on the suspension of the usual relations of peace. Commerce may be suspended or interdicted between the subjects of different states, without producing a state of war. Reprisals and embargoes are forcible measures of redress, but do not, *per se*, constitute war, nor does the furnishing of specific assistance to one of the parties at war, according to a previous stipulation. *Vide infra*, p. 116. Mr. Manning, in his Commentaries on the Law of Nations, p. 98, after showing the imperfect definitions given by publicists, defines an open and solemn war to be "the state of nations among whom there is an interruption of all pacific relations, and a general contention by force, authorized by the sovereign."

(*a*) Grotius, b. 1, c. 1, sec. 6; b. 3, c. 8, sec. 4; Puff. lib. 8, c. 6, 19, 20; Bynk. lib. 1, c. 7; Lord Hale also laid it down to be the law of England. 1 Hale's P. C. 95.

(*b*) Dig. 41, 1 and 49, 15.

(*c*) Lib. 3, c. 26.

ises are not to be kept, mentions that of the creditor becoming the enemy of the country of the debtor. Down to the year 1737, the general opinion of jurists was in favor of the right; but Vattel says, that a relaxation of the rigor of the rule has since taken place among the sovereigns of Europe, and that, as the custom has been generally received, he who should act contrary to it would injure the public faith; for strangers trusted his subjects only from a firm persuasion that the general custom would be observed. (*d*) There has frequently been a stipulation in modern treaties, that debts or moneys in the public funds should not be confiscated in the event of war; and these conventional provisions are evidence of the sense of the governments which are parties to them, and that the right of confiscation of debts and things in action is against good policy, and ought *to be discon- *63 tinued. The treaties between the United States and Colombia, in 1825, and Chili, in 1832, and Venezuela, in 1836, and the Peru-Bolivian Confederation, in 1838, and Ecuador, in 1839, contain such a provision; but the treaty between the United States and Great Britain, in 1795, went further, and contained the explicit declaration, that it was "unjust and impolitic" that the debts of individuals should be impaired by national differences. A very able discussion of this assumed right to confiscate debts was made by Mr. Hamilton, in the numbers of Camillus, published in 1795. He examined the claim to confiscated private debts, or private property in banks, or in public funds, on the ground of reason and principle, on those of policy and expediency, on the opinion of jurists, on usage, and on conventional law; and his argument against the justice and policy of the claim was exceedingly powerful. He contended it to be against good faith for a government to lay its hands on private property, acquired by the permission, or upon the invitation of the government, and under a necessarily implied promise of protection and security. Vattel says, that everywhere, in case of a war, funds credited to the public are exempt from confiscation and seizure. Emerigon (*a*) and Martens (*b*) make the same declaration. The practice would have a very injurious influence upon the general sense of the inviolability and sanctity of private contracts; and with debt-

(*d*) Vattel, b. 3, c. 5, sec. 77.
(*a*) Des Ass. tom. i. 567.
(*b*) B. 8, c. 2, sec. 5.

ors who had a nice and accurate sense of justice and honor, the requisition of government would not be cheerfully or readily obeyed. Voltaire has given (*c*) a striking instance of the impracticability of confiscating property deposited in trust with a debtor, and of the firmness of Spanish faith. When war was declared between France and Spain, in 1684, the king of Spain endeav-
* 64 ored to seize the property of the French in Spain, but * not a single Spanish factor would betray his French correspondent. (*a*)

Notwithstanding the weight of modern authority, and of argument, against this claim of right on the part of the sovereign, to confiscate the debts and funds of the subjects of his enemy during war, the judicial language in this country is decidedly in support of the right. In the case of *Brown* v. *The United States*, (*b*) already mentioned, Judge Story, in the Circuit Court in Massachusetts, laid down the right to confiscate debts and enemy's property found in the country, according to the rigorous doctrine of the elder jurists; and he said the opinion was fully confirmed by the judgment of the Supreme Court in *Ware* v. *Hylton*, (*c*) where the doctrine was explicitly asserted by some of the judges, reluctantly admitted by others, and denied by none. Chief Justice Marshall, in delivering the opinion of the Supreme Court, in the case of Brown, observed, that between debts contracted under the faith of laws, and property acquired in the course of trade on the faith of the same laws, reason drew no distinction, and the right of the sovereign to confiscate debts was precisely the same with the right to confiscate other property found in the
* 65 country. This right, * therefore, was admitted to exist as a

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(*c*) Essai sur les Mœurs et l'Esprit des Nations.

(*a*) The English Court of K. B. declared, in the case of Wolff *v.* Oxholm, 6 Maule & Selw. 92, that an ordinance of Denmark, in 1807, pending hostilities with England, which sequestered debts due from Danish to English subjects, and caused them to be paid over to the Danish government, was not a defence to a suit in England for the debt, and that the ordinance was not conformable to the usage of nations, and was void. It was observed by the court, that the right of confiscating debts, contended for on the authority of Vattel, b. 2, c. 18, sec. 344; b. 3, c. 5, sec. 77, was not recognized by Grotius, (see Grot. lib. 3, c. 7, sec. 4; and c. 8, sec. 4,) and was impugned by Puffendorf, (b. 8, c. 6, sec. 22) and others; and that no instance had occurred of the exercise of the right, except the ordinance in question, for upwards of a century.

(*b*) 8 Cranch, 110.

(*c*) 3 Dallas, 199.

settled and decided right, *stricto jure*, though, at the same time, it was conceded to be the universal practice to forbear to seize and to confiscate debts and credits. We may, therefore, lay it down as a principle of public law, so far as the same is understood and declared by the highest judicial authorities in this country, that it rests in the discretion of the legislature of the Union, by a special law for that purpose, to confiscate debts contracted by our citizens, and due to the enemy; but, as it is asserted by the same authority, this right is contrary to universal practice, and it may, therefore, well be considered as a naked and impolitic right, condemned by the enlightened conscience and judgment of modern times.

If property should have been wrongfully taken by the state before the war, and be in the country at the opening of the war, such property cannot be seized, but must be restored; because to confiscate that species of enemy's property would be for the government to take advantage of its own wrong. The celebrated Report of the English law officers of the crown, 1753, in answer to the Prussian Memorial, stated, that French ships taken before the war of 1741, were, during the heat of the war with France, as well as afterwards, restored by sentences of the admiralty courts to the French owners. (*a*) No such property was ever attempted to be

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(*a*) The case of the Silesian loan contains, in the discussions between the Prussian and British courts, in 1752, a memorable exposition of the law of nations on the subject of belligerent rights and duties. The Report of the high and distinguished law officers of the crown, in answer to the Prussian Memorial, made in 1753, was declared by such eminent writers as Vattel and Montesquieu, to be an excellent and unanswerable tract on the law of nations. See the substance of the discussion in Wheaton's History of the Law of Nations, edit. N. Y. 1845, pp. 206 – 217, and the Report at large. Collectanea Juridica, vol. i. p. 95. The case is worthy of special notice, not only for the authority of the work, but for the recognition of the sanctity of private debts and contracts, in opposition to the pretensions of the rights of war and conquest. In that case, a loan of money was made by British creditors to the Emperor of Germany, in 1735, and for the better security of the payment of the loan, with interest, he mortgaged his revenues of the Duchies of Silesia; and when Silesia was conquered by Prussia, the Empress Queen, who had succeeded to the sovereignty of the country, before its conquest, ceded the Duchies to the King of Prussia, upon condition that the king should be responsible for the debt, and he assumed the payment of it. The king afterwards seized the revenues, by way of reprisal and indemnity against losses by British cruisers, under lawful capture and condemnation by the laws of war. The Report showed, unanswerably, as Montesquieu admitted, that the King of Prussia could not lawfully seize the mortgaged revenues or debt, by way of reprisal, and that he was bound by the law of nations, and every principle of justice, to pay the British

confiscated; for had it not been for the wrong done, the property would not have been within the king's dominions. And yet even such property is considered to be subject to the rule of vindictive retaliation; and Sir William Scott observed, in the case of *The Santa Cruz*, (*b*) that it was the constant practice of England to condemn property seized before the war, if the enemy condemns, and to restore, if the enemy restores.

*66 * One of the immediate and important consequences of the declaration of war, is the absolute interruption and interdiction of all commercial correspondence, intercourse and dealing between the subjects of the two countries. The idea that any commercial intercourse, or pacific dealing, can lawfully subsist between the people of the powers at war, except under the clear and express sanction of the government, and without a special license, is utterly inconsistent with the new class of duties growing out of a state of war. (*a*) The interdiction flows necessarily from the principle already stated, that a state of war puts all the members of the two nations respectively in hostility to each other; and to suffer individuals to carry on a friendly or commercial intercourse, while the two governments were at war, would be placing the act of government and the acts of individuals in contradiction to each other. It would counteract the

Trading with the enemy.

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creditors. The King of Prussia, by treaty in 1756, agreed to take off the sequestration laid on the Silesian debt, and pay the capital and interest due to the British creditors.

(*b*) 1 Rob. Adm. 50.

(*a*) The doctrine goes to the extent of holding it unlawful, after the commencement of war, except under the special license of the government, to send a vessel to the enemy's country to bring home, with their permission, one's own property, which was there when the war broke out. It would be liable to seizure, *in transitu*, as enemy's property. The Rapid, 8 Cranch, 155; Potts *v.* Bell, 8 Term Rep. 548; in the case of The Juffrow Catharina, 5 Rob. Adm. 141, and of The Hoop, 1 Rob. Adm. 196, Sir Wm. Scott inculcated very strictly the duty of applying in all cases for the protection of a license, where property is to be withdrawn from the country of the enemy, as being the only safe course. Mr. Duer, in his Treatise on Insurance, vol. i. pp. 561 – 566, ably and successfully contends, that when a subject finds himself in an enemy's country on the breaking out of war, he may return diligently to his country, *with his property*, without rendering it justly liable to confiscation by the prize courts of his own country; though the language of Mr. Justice Story, in the cases of The Rapid, in 1 Gallison, 309, and The Mary, Id. 621, goes to the extent of the severe denial of that right under any circumstances. If the adverse belligerent allow such a right, as, see *supra*, p. 56, surely his own country ought to exercise the same lenity. Such was the decision of the Supreme Court of New York, in Amory *v.* McGregor, 15 Johns. 24.

operations of war, and throw obstacles in the way of the public efforts, and lead to disorder, imbecility, and treason. Trading supposes the existence of civil contracts and relations, and a reference to courts of justice; and it is, therefore, necessarily, contradictory to a state of war. It affords aid to the enemy in an effectual manner, by enabling the merchants of the enemy's country to support their government, and it facilitates the means of conveying intelligence, and carrying on a traitorous correspondence with the enemy. These considerations apply with peculiar force to maritime states, where the principal object is to destroy the marine resources and commerce of the enemy, in order to force them to peace. (*b*) It is a well-settled doctrine in the English courts, and with the English jurists, that there cannot exist, at the same time, a war for arms and a peace for commerce. The war puts an end at once to all dealing and all communication with each other, and places every individual of the respective governments, as * well as the governments themselves, in a * 67 state of hostility. (*a*)[1] This is equally the doctrine of all the authoritative writers on the law of nations, and of the maritime ordinances of all the great powers of Europe. It is equally the received law of this country, and was so decided frequently by the Congress of the United States during the Revolutionary war, and again by the Supreme Court of the United States during the course of the last war; and it is difficult to conceive of a point of doctrine more deeply or extensively rooted in the general maritime law of Europe, and in the universal and immemorial usage of the whole community of the civilized world.

It follows as a necessary consequence of the doctrine of the illegality of all intercourse or traffic, without express permission, that all contracts with the enemy, made during war, are utterly void. The insurance of enemy's property is an illegal contract, because it is a species of trade and intercourse with the enemy. The drawing of a bill of exchange,

Contracts with an enemy.

(*b*) 1 Chitty Comm. Law, 378.

(*a*) Potts *v.* Bell, 8 Term Rep. 548; Willison *v.* Patteson, 7 Taunt. 439; Story J., in The Joseph, 1 Gallison, 549, 550; in The Julia, id. 601 – 603; Jonge Pieter, 4 Rob. Adm. 79; The Hoop, 1 Rob. Adm. 199, 217; The Rapid, 1 Gallison, 305.

[1] Clemontson *v.* Blessig, 32 E. L. & Eq. 544. The court will not grant a commission to examine witnesses in an enemy's country. Barrick *v.* Buba, 32 E. L. & Eq. 465.

by an alien enemy, on a subject of the adverse country, is an illegal and void contract, because it is a communication and contract. The purchase of bills on the enemy's country, or the remission and deposit of funds there, is a dangerous and illegal act, because it may be cherishing the resources and relieving the wants of the enemy. The remission of funds in money or bills to subjects of the enemy is unlawful. The inhibition reaches to every communication, direct or circuitous. All endeavors at trade with the enemy, by the intervention of third persons, or by partnerships, have equally failed, and no artifice has succeeded to legalize the trade, without the express permission of the government. (*b*) Every relaxation of the rule tends to corrupt
*68 the allegiance of the subject, and prevents *the war from fulfilling its end. The only exception to this strict and rigorous rule of international jurisprudence is the case of ransom bills, and they are contracts of necessity, founded on a state of war, and engendered by its violence. (*a*) It is also a further consequence of the inability of the subjects of the two states to commune or carry on any correspondence or business together, that all commercial partnerships existing between the subjects of the two parties prior to the war are dissolved by the mere force and act of the war itself; though other contracts existing prior to the war are not extinguished, but the remedy is only suspended, and this from the inability of an alien enemy to sue, or to sustain, in the language of the civilians, a *persona standi in judicio*. The whole of this doctrine, respecting the illegality of any commercial intercourse between the inhabitants of two nations at war, was extensively reviewed, and the principal authorities, ancient and modern, foreign and domestic, were accurately examined, and the positions which have been laid down established, in the case of *Griswold* v. *Waddington*, (*b*) decided in the Supreme Court of New York, and afterwards affirmed on error.

(*b*) Willison *v.* Patteson, *ub sup.;* The Indian Chief, 3 Rob. Adm. 22; The Jonge Pieter, 4 Rob. Adm. 79; The Franklin, 6 Rob. Adm. 127.

(*a*) There is another exception to the general rule, in the case of a war contract arising out of a public necessity, created by the war itself. This is the case of a bill of exchange drawn upon England by a British prisoner in France, for his own subsistence, and indorsed to an alien enemy, and which the latter, on the return of peace, was allowed to enforce. Antoine *v.* Morshead, 6 Taunt. 237.

(*b*) 15 Johns. 57; 16 Johns. 438, S. C.; Scholefield *v.* Eichelberger, 7 Peters U. S. 586, S. P.

This strict rule has been carried so far in the British admiralty, as to prohibit a remittance of supplies even to a British colony during its temporary subjection to the enemy, and when the colony was under the necessity of supplies, and was only very partially and imperfectly supplied by the enemy.(*c*) The same interdiction of trade applies to ships of truce, or cartel ships, which are a species of navigation intended for the recovery of the liberty of prisoners of war. Such a special and limited intercourse is dictated by policy and humanity, and it is indispensable that it be conducted with the most exact and exclusive attention to the original purpose, as being the only condition upon which the intercourse * can be tolerated. All trade, therefore, by * 69 means of such vessels, is unlawful, without the express consent of both the governments concerned.(*a*) It is equally illegal for an ally of one of the belligerents, and who carries on the war conjointly, to have any commerce with the enemy. A single belligerent may grant licenses to trade with the enemy, and dilute and weaken his own rights at pleasure, but it is otherwise when allied nations are pursuing a common cause. The community of interests and object and action creates a mutual duty not to prejudice that joint interest; and it is a declared principle of the law of nations, founded on very clear and just grounds, that one of the belligerents may seize and inflict the penalty of forfeiture on the property of a subject of a co-ally, engaged in a trade with the common enemy, and thereby affording him aid and comfort whilst the other ally was carrying on a severe and vigorous warfare. It would be contrary to the implied contract in every such warlike confederacy, that neither of the belligerents, without the other's consent, shall do anything to defeat the common object. (*b*)

In the investigation of the rules of the modern law of nations, particularly with regard to the extensive field of maritime capture, reference is generally and freely made to the decisions of the English courts. They are in the habit of taking accurate and comprehensive views of general jurisprudence, and they have been deservedly followed by the courts of the United States on all the leading points of national

Judicial decisions on public law.

(*c*) Case of The Bella Guidita, in 1785, cited in the case of The Hoop, 1 Rob. Adm. 207.

(*a*) The Venus, 4 Rob. Adm. 355; The Carolina, 6 Rob. Adm. 336.

(*b*) The Nayade, 4 Rob. Adm. 251; The Neptunus, 6 Rob. Adm. 403.

law. We have a series of judicial decisions in England and in this country, in which the usages and the duties of nations are explained and declared with that depth of research, and that liberal and enlarged inquiry, which strengthen and embellish the conclusions of reason. They contain more intrinsic argu-
*70 ment, more full and precise details, *more accurate illustrations, and are of more authority than the loose *dicta* of elementary writers. When those courts in this country, which are charged with the administration of international law, have differed from the English adjudications, we must take the law from domestic sources; but such an alternative is rarely to be met with; and there is scarcely a decision in the English prize courts at Westminster, on any general question of public right, that has not received the express approbation and sanction of our national courts. We have attained the rank of a great commercial nation, and war, on our part, is carried on upon the same principles of maritime policy which have directed the forces and animated the councils of the naval powers of Europe. When the United States formed a component part of the British empire, our prize law and theirs was the same; and after the revolution it continued to be the same, as far as it was adapted to our circumstances, and was not varied by the power which was capable of changing it. The great value of a series of judicial decisions, in prize cases, and on other questions depending on the law of nations, is, that they render certain and stable the loose general principles of that law, and show their application, and how they are understood in the country where the tribunals are sitting. They are, therefore, deservedly received with very great respect, and are presumptive, though not conclusive, evidence of the law in the given case. This was the language of the Supreme Court of the United States, so late as 1815; (*a*) and the decisions of the English high court of admiralty, especially since the year 1798, have been consulted and uniformly respected by that court, as enlightened commentaries on the law of nations, and affording a vast variety of instructive precedents for the application of the principles of that law. They have also this to recommend them; that they are pre-eminently distinguished for sagacity, wisdom, and learn-
*71 ing, as *well as for the chaste and classical beauties of their composition.

(*a*) 9 Cranch, 198.

Many of the most important principles of public law have been brought into use, and received a practical application, and been reduced to legal precision, since the age of Grotius and Puffendorf; and we must resort to the judicial decisions of the prize tribunals, in Europe and in this country, for information and authority on a great many points, on which all the leading text-books have preserved a total silence. The complexity of modern commerce has swelled beyond all bounds the number and intricacy of questions upon national law, and particularly upon the very comprehensive head of maritime capture. The illegality and penal consequences of trade with the enemy; the illegality of carrying enemy's despatches, or of engaging in the coasting, fishing, or other privileged trade of the enemy; the illegality of transfer of property *in transitu*, between the neutral and belligerent; the rules which impress upon neutral property a hostile character, arising either from the domicil of the neutral owner, or his territorial possessions, or his connection with a house in trade in the enemy's country, are all of them doctrines in the modern international law, which are either not to be found at all, or certainly not with any fulness of discussion and power of argument, anywhere, but in the judicial investigations to which I have referred, and which have given the highest authority and splendor to this branch of learning.

LECTURE IV.

OF THE VARIOUS KINDS OF PROPERTY LIABLE TO CAPTURE.

Property, when deemed hostile.

It becomes important, in a maritime war, to determine with precision what relations and circumstances will impress a hostile character upon persons and property; and the modern international law of the commercial world is replete with refined and complicated distinctions on this subject. It is settled, that there may be a hostile character merely as to commercial purposes, and hostility may attach only to the person as a temporary enemy, or it may attach only to property of a particular description. This hostile character, in a commercial view, or one limited to certain intents and purposes only, will attach in consequence of having possessions in the territory of the enemy, or by maintaining a commercial establishment there, or by a personal residence, or by particular modes of traffic, as by sailing under the enemy's flag or passport. This hostile relation, growing out of particular circumstances, assumes as valid the distinction which has been taken between a permanent and a temporary alien enemy. A man is said to be permanently an alien enemy when he owes a permanent allegiance to the adverse belligerent, and his hostility is commensurate in point of time with his country's quarrel. But he who does not owe a permanent allegiance to the enemy is an enemy only during the existence and continuance of certain circumstances. A neutral, for instance, said Ch. J. Eyre,(*a*) can be an alien enemy only with respect to his acts done under a local or temporary allegiance to a power at war, and when his temporary allegiance determines, his hostile character determines also.

It was considered by Sir William Scott, in the case of *The Phœnix*, (*b*) and again, in the case of *The Vrow Anna Catharina*, (*c*) to be a fixed principle of maritime law, that the possession of the soil impressed upon the owner the character of the

(*a*) Sparenburgh *v.* Bannatyne, 1 Bos. & Pull. 163.
(*b*) 5 Rob. Adm. 21.
(*c*) 5 Rob. Adm. 161.

country, so far as the produce of the soil was concerned, wherever the local residence of the owner might be. The produce of a hostile soil bears a hostile character for the purpose of capture, and is the subject of legitimate prize when taken in a course of transportation to any other country. The enemy's lands are supposed to be a great source of his wealth, and, perhaps, the most solid foundation of his power; and whoever owns or possesses land in the enemy's country, though he may in fact reside elsewhere, and be in every other respect a neutral or friend, must be taken to have incorporated himself with the nation, so far as he is a holder of the soil; and the produce of that soil is held to be enemy's property, independent of the personal residence or occupation of the owner. The reasonableness of this principle will be acceded to by all maritime nations; and it was particularly recognized as a valid doctrine by the Supreme Court of the United States, in *Bentzon* v. *Boyle*. (*d*)

Domicil in the enemy's country.

If a person has a settlement in a hostile country by the maintenance of a commercial establishment there, he will be considered a hostile character, and a subject of the enemy's country, in regard to his commercial transactions connected with that establishment. The position is a clear one, that if a person goes into a foreign country, and engages in trade there, he is, by the law of nations, to be considered a merchant of that country, and a subject for all civil purposes, * whether that country be hostile or neutral; and he cannot * 75 be permitted to retain the privileges of a neutral character, during his residence and occupation in an enemy's country. (*a*)[1] This general rule has been applied by the English courts to the case of Englishmen residing in a neutral country, and they are admitted, in respect to their *bonâ fide* trade, to the privileges of the neutral character. (*b*) In the case of *The Danous*, (*c*) the rule was laid down by the English House of Lords, in 1802, in unrestricted terms; and a British-born subject, resident in Portugal,

(*d*) 9 Cranch, 191.

(*a*) Wilson *v.* Marryat, 8 Term Rep. 31; M'Connell *v.* Hector, 3 Bos. & Pull. 113; The Indian Chief, 3 Rob. Adm. 12; The Anna Catharina, 4 Rob. Adm. 107; The President, 5 Rob. Adm. 277; Lord Stowell, 1 Hagg. Adm. 103, 104.

(*b*) M'Connell *v.* Hector, 3 Bos. & Pull. 113; The Emanuel, 1 Rob. Adm. 296.

(*c*) Cited in 4 Rob. Adm. 255, note.

[1] The Amado, 1 Newberry Adm. 400; The Aina, 28 E. L. & Eq. 600.

was allowed the benefit of the Portuguese character, so far as to render his trade with Holland, then at war with England, not impeachable as an illegal trade. The same rule was afterwards applied (*d*) to a natural-born British subject domiciled in the United States, and it was held, that he might lawfully trade to a country at war with England, but at peace with the United States.

This same principle, that, for all commercial purposes, the domicil of the party, without reference to the place of birth, becomes the test of national character, has been repeatedly and explicitly admitted in the courts of the United States. If he resides in a belligerent country, his property is liable to capture as enemy's property, and if he resides in a neutral country, he enjoys all the privileges, and is subject to all the inconveniences, of the neutral trade. He takes the advantages and disad-
*76 vantages, whatever they *may be, of the country of his residence. (*a*) The doctrine is founded on the principles of national law, and accords with the reason and practice of all civilized nations. *Migrans Jura amittat ac Privilegia et immunitates domicilii prioris.* (*b*) A person is not, however, permitted to acquire a neutral domicil, that will protect such a trade in opposition to the belligerent claims of his native country, if he emigrate from that country *flagrante bello.* (*c*) Vattel (*d*) denies explicitly the right of emigration in a war in which his country is involved. It would be a criminal act. (*e*) This doctrine is considered as settled in the United States. (*f*)

The only limitation upon the principle of determining the character from residence is, that the party must not be found in hostility to his native country. He must do nothing inconsistent with his native allegiance; and this qualification is annexed to the rule by Sir William Scott, in the case of *The Emanuel*, and

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(*d*) Bell *v.* Reid, 1 Maule & Selw. 726.

(*a*) Case of the Sloop Chester, 2 Dallas, 41; Murray *v.* Schooner Betsey, 2 Cranch, 64; Maley *v.* Shattuck, 3 Cranch, 488; Livingston *v.* Maryland Insurance Co. 7 Cranch, 506; The Venus, 8 Cranch, 253; The Frances, 8 Cranch, 363.

(*b*) Voet, Comm. ad Pand. tom. i. 347.

(*c*) The Dos Hermanos, 2 Wheaton, 76.

(*d*) B. 1, c. 19, sec. 220 – 223.

(*e*) See, also, to the same effect, Grotius, lib. 2, c. 5, sec. 2. Puffendorf, par Barbeyrac, b. 8, c. 11, sec. 3.

(*f*) Duer on Insurance, vol. i. 521.

the same qualification exists in the French law, as well since as before their revolution. (*g*) It has been questioned, whether the rule does not go too far, even with this restriction; but it appears to be too well and solidly settled to be now shaken.

It has been a question admitting of much discussion and difficulty, arising from the complicated character of commercial speculations, what state of facts constitutes a residence so as to change or fix the commercial character of the party. The *animus manendi* appears to have been the point to be settled. The presumption, arising from actual residence in any place, is, that the party is there *animo manendi*, and it lies upon him to remove the presumption, if it should be requisite for his safety. (*h*) If the intention to establish a permanent residence be ascertained, the recency *of the establishment, *77 though it may have been for a day only, is immaterial. If there be no such intention, and the residence be involuntary or constrained, then a residence, however long, does not change the original character of the party, or give him a new and hostile one. (*a*) But the circumstances requisite to establish the domicil are flexible, and easily accommodated to the real truth and equity of the case. Thus it requires fewer circumstances to constitute domicil in the case of a native subject, who returns to reassume his original character, than it does to impress the national character on a stranger. (*b*) The *quo animo* is, in each case, the real subject of inquiry; and when the residence exists freely, without force or restraint, it is usually held to be complete, whether it be an actual or only an implied residence.

Domicil, its test.

When the residence is once fixed, and has communicated a national character to the party, it is not devested by a periodical absence, or even by occasional visits to his native country. (*c*) Nor is it invariably necessary that the residence be personal, in order to impress a person with a national character. The general rule undoubtedly is, that a neutral merchant may trade in the ordinary manner to the country of a belligerent, by means of a

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(*g*) 1 Rob. Adm. 296; Code Napoleon, Nos. 17, 21; Pothier's Traité du Droit de Propriété, No. 94.

(*h*) The Bernon, 1 Rob. Adm. 102.

(*a*) The Diana, 5 Rob. Adm. 60; The Ocean, 5 Rob. Adm. 90.

(*b*) La Virginie, 5 Rob. Adm. 99.

(*c*) 1 Acton, 116; 9 Cranch, 414; Marshall Ch. J., The Friendschaft, 3 Wheaton, 14.

stationed agent there, and yet not contract the character of a domiciled person. But if the principal be trading, not on the ordinary footing of a foreign merchant, but as a privileged trader of the enemy, such a privileged trade puts him on the same ground with their own subjects, and he would be considered as sufficiently invested with the national character by the residence of his agent. Sir William Scott, in the case of *The Anna* *78 *Catharina*, (*d*) applied this distinction to the case of *a neutral, invested with the privileges of a Spanish merchant, and the full benefit of the Spanish character; and this case has been followed to its fullest extent in this country. (*a*) It affords a sample of that piercing and unwearied investigation which the courts of admiralty have displayed in unravelling the intricate process by which an enemy's trade was attempted to be protected from hostile seizure, and in the application of sound principles of national law to new and complex cases. On the same ground it has been decided, (*b*) that an American consul-general in Scotland, committing his whole duty to vice-consuls, was deemed to have lost his neutral character by engaging in trade in France; and it is well settled, that if a foreign consul carries on trade as a merchant, in an enemy's country, his consular residence and character will not protect that trade from interruption by seizure and condemnation as enemy's property. (*c*)

A national character, acquired by residence, may be thrown off at pleasure, by a return to the native country.[1] It is an adventitious character, and ceases by non-residence, or when the party puts himself in motion *bonâ fide*, to quit the country *sine animo revertendi;* and such an intention is essential, in order to enable the party to reassume his native character. (*d*) In the case of *The Venus*, (*e*) the decisions of the English courts on the subject

(*d*) 4 Rob. Adm. 107.

(*a*) The San Jose Indiano, 2 Gallison, 268. In this case, says Mr. Duer, in his work on Insurance, vol. i. 527, the language of Mr. Justice Story reflects the spirit and emulates the style of the illustrious judge whose doctrines he adopts and defends.

(*b*) The Twee Gebroeders, 4 Rob. Adm. 232.

(*c*) Vattel, b. 4, c. 8, sec. 114; The Indian Chief, 3 Rob. Adm. 22; Albrecht *v.* Sussinan, 2 Ves. & Bea. 323; Arnold & Ramsey, *v.* U. I. Company, 1 Johns. Cas. 363.

(*d*) The Indian Chief, 3 Rob. Adm. 12; The Friendschaft, 3 Wheaton, 14.

(*e*) 8 Cranch, 253; The Venus. In this case, Ch. J. Marshall dissented from the

[1] United States *v.* Guillem, 11 How. U. S. 47.

of national character, acquired by residence, and on the consequences of such acquired character, were recognized as being founded on sound principles of public law. It was declared, that the law of nations distinguishes between a temporary residence in a foreign *country for a special purpose, and a *79 residence, accompanied with an intention to make it the party's domicil, or permanent place of abode; and that the doctrine of the prize courts, and the common-law courts of England, was the same on this subject with that of the public jurists. As a consequence of the doctrine of domicil, the court decided, that if a citizen of the United States should establish his commercial domicil in a foreign country, and hostilities should afterwards break out between that country and the United States, his property, shipped before knowledge of the war, and while that domicil continued, would be liable to capture, on the ground that his permanent residence had stamped him with the national character of that country. The hostile character was deemed to attach to the American citizen, only in respect to his property connected with his residence in the enemy's country; and the converse of the proposition was also true, that the subject of a belligerent state, domiciled in a neutral country, was to be considered a neutral by both the belligerents, in reference to his trade. The doctrine of enemy's property, arising from a domicil in an enemy's country, is enforced strictly; and equitable qualifications of the rule are generally disallowed, for the sake of preventing frauds on belligerent rights, and to give the rule more precision and certainty.

In the law of nations, as to Europe, the rule is, that men take their national character from the general character of the country in which they reside; and this rule applies equally to America. But in Asia and Africa an immiscible character is kept up, and Europeans, trading under the protection of a factory, take their

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decision of the court, and contended that a commercial domicil, wholly acquired in time of peace, ceased at the commencement of hostilities, which superseded the motives that alone induced the foreign residence; that the presumption of an intention to return to the native country at the first opportunity was to be entertained; and that this presumption ought to shield the property from condemnation until delay or circumstances should destroy that presumption. Mr. Duer, in his Treatise on Insurance, vol. i. 494 – 508, considers this opinion of the Ch. J. as exceedingly able, and he evidently concurs in that opinion. There is no doubt of its superior solidity and justice.

national character from the establishment under which they live and trade. This rule applies to those parts of the world from obvious reasons of policy, because foreigners are not admitted there, as in Europe, "and the western part of the world," into the general body and mass of the society of the nation, but they continue strangers and sojourners, not acquiring any na-
*80 tional *character under the general sovereignty of the country. (*a*)

Character from traffic.

National character may be acquired in consideration of the traffic in which the party is concerned. If a person connects himself with a house of trade in the enemy's country, in time of war, or continues during a war a connection formed in a time of peace, he cannot protect himself by having his domicil in a neutral country. He is considered as impressed with a hostile character, in reference to so much of his commerce as may be connected with that establishment. The rule is the same, whether he maintains that establishment as a partner or as a sole trader. (*b*) The Supreme Court of the United States, referring to the English prize cases on this subject, observed, that they considered the rule to be inflexibly settled, and that they were not at liberty to depart from it, whatever doubt might have been entertained if the case was entirely new.

But though a belligerent has a right to consider as enemies all persons who reside in a hostile country, or maintain commercial establishments there, whether they be by birth neutrals, or allies, or fellow-subjects, yet the rule is accompanied with this equitable qualification, that they are enemies *sub modo* only, or in reference to so much of their property as is connected with that residence or establishment. This nice and subtle distinction allows a merchant to act in two characters, so as to protect his property connected with his house in a neutral country, and to subject to seizure and forfeiture his effects belonging to the establishment in the belligerent country. So there may be a partnership between two persons, the one residing in a neutral, and the other in a
*81 belligerent country, and the trade of one *of them with the enemy will be held lawful, and that of the other unlawful,

(*a*) The Indian Chief, 3 Rob. Adm. 22.

(*b*) The Vigilantia, 1 Rob. Adm. 1; The Portland, 3 Rob. Adm. 41; The San Jose Indiano, 2 Gallison, 268; The Antonia Johanna, 1 Wheaton, 159; The Friendschaft, 4 Wheaton, 105.

and consequently the share of one partner in the joint traffic will be condemned, while that of the other will be restored. This distinction has been frequently sustained, notwithstanding the difficulties that may attend the discrimination between the innocent and the noxious trade, and the rule has been introduced into the maritime law of this country. (*a*)

Colonial trade of the enemy.

The next mode in which a hostile character may be impressed, according to the doctrine of the English courts, is by dealing in those branches of commerce which were confined, in time of peace, to the subjects of the enemy. There can be no doubt that a special license, granted by a belligerent to a neutral vessel to trade to her colony, with all the privileges of a native vessel, in those branches of commerce which were before confined to native subjects, would warrant the presumption that such vessel was adopted and naturalized, or that such permission was granted in fraud of the belligerent right of capture, and the property so covered may reasonably be regarded as enemy's property. This was the doctrine in the case of *Berens* v. *Rucker*, as early as 1760. (*b*) But the English rule goes further, and it annexes a hostile character, and the penal consequences of confiscation, to the ship and cargo of a neutral engaged in the colonial or coasting trade of the enemy, not open to foreigners in time of peace, but confined to native subjects by the fundamental regulations of the state. This prohibition stands upon two grounds: 1st. That if the coasting or colonial trade, reserved by the permanent policy of a nation to its own subjects and vessels, be opened to neutrals during war, the act proceeds from the pressure of the naval force of the enemy, and to obtain relief from that pressure. The neutral who interposes to relieve the belligerent, under such circumstances, * rescues * 82 him from the condition to which the arms of the enemy had reduced him, restores to him those resources which had been wrested from him by the arms of his adversary, and deprives that adversary of the advantages which successful war had given him. This the opposing belligerent pronounces a departure from neu-

(*a*) The Portland, 3 Rob. Adm. 41; The Herman, 4 Rob. Adm. 228; The Jonge Classina, 5 Rob. Adm. 297; The San Jose Indiano, 2 Gallison, 268.

(*b*) 1 Wm. Bl. Adm. 313. See, also, the case of the Princessa, 2 Rob. Adm. 52. The Anna Catharina, 4 Rob. Adm. 107; The Rendsborg, Rob. Adm. 121; The Vrow Anna Catharina, 5 Rob. Adm. 15.

trality, and an interference in the war, to his prejudice. 2d. If the trade be not opened by law, the neutral employed in a trade reserved by the enemy to his own vessels identifies himself with that enemy, and assumes his character. These principles first became a subject of interesting discussion in the war of 1756, and they are generally known in England, and in this country, by the appellation of the rule of 1756; but the rule is said to have been asserted before that period.

Rule of 1756.

In the letter of Puffendorf to Groningius, published in 1701, (*a*) he says that the English and the Dutch were willing to leave to neutrals the commerce they were accustomed to carry on in time of peace, but were not willing to allow them to avail themselves of the war to augment it, to the prejudice of the English and the Dutch. The French ordinances of 1704 and 1744, (*b*) have been considered as founded upon the basis of the same rule, and regulations are made to enforce it, and to preserve to neutrals the same trade which they had been accustomed to enjoy in peace, and to prohibit them from engaging in the colonial trade of the enemy. There is some evidence, also, that in the reign of Charles II., neutral vessels were considered, both by England and Holland, to be liable to capture and condemnation, for being concerned in the coasting trade of the enemy. The Dutch, at that day, contended for this neutral exclusion, on the authority of general reasoning and the practice of nations; and the same rule is said to have been asserted in the English courts, in the war of 1741, and the exclusion of neutral vessels from the coasting * 83 trade of the enemy was declared to stand upon * the law of nations. (*a*) But it was in the war of 1756 that the rule awakened general and earnest attention. Mr. Jenkinson, in his "Discourse on the conduct of Great Britain in respect to neutral nations," written in 1757, considered it to be unjust and illegal for neutrals to avail themselves of the pressure of war, to engage in a new species of traffic, not permitted in peace, and which the necessities of one belligerent obliged him to grant to the detriment, or perhaps to the destruction, of the other. (*b*) On the other

(*a*) Puff. Droit des Gens, par Barbeyrac, tom. ii. 558.

(*b*) Valin's Com. 248, 250.

(*a*) 6 Rob. Adm. 74, note, and 252, note.

(*b*) In the British Memorial, addressed to the Deputies of the States General of Holland, December 22d, 1758, the injustice of neutrals in assuming the enemy's

hand, Hübner, who published his treatise (*c*) in 1759, is of opinion that neutrals may avail themselves of this advantage presented by the war, though he admits the lawfulness of the trade to be a question of some uncertainty.

Thus seemed to stand the authority of the rule of 1756, (*d*) when it was revived and brought into operation by England, in the war of 1793, and again upon the renewal of war in 1803. The rule was enforced by her, under occasional relaxations, during the long course of the wars arising out of the French revolution; and it was frequently vindicated by Sir William Scott, in the course of his judicial decisions, with his customary ability and persuasive manner, as a rule founded in natural justice, and the established jurisprudence of nations. (*e*) On the other hand, the government of the United States constantly and earnestly protested against the legality of the rule, to the extent claimed by Great Britain; and they insisted, in their diplomatic intercourse, that the * rule was an attempt to establish "a new * 84 principle of the law of nations," and one which subverted "many other principles of great importance, which have heretofore been held sacred among nations." They insisted, that neutrals were of right entitled "to trade, with the exception of blockades and contrabands, to and between all ports of the enemy, and in all articles, although the trade should not have been opened to them in time of peace." (*a*) It was considered to be the right of every independent power to treat, in time of peace, with every other nation, for leave to trade with its colonies, and to enter into any trade, whether new or old, that was not of itself illegal, and a violation of neutrality. One state had nothing to do with the

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carrying trade was urged, and it was declared that their *high mightinesses had never suffered such a trade,* and that it had been opposed in all countries in like circumstances.

(*c*) De la Saisie des Batimens Neutres. Mr. Wheaton, in his History of the Law of Nations in Europe and America, New York, 1845, pp. 219–228, has given a summary of the two small volumes of Hübner on neutral rights; and he says that the doctrines of Hübner found but little favor with the public jurists, his contemporaries. It is a work of inferior weight and authority.

(*d*) It stood upon loose grounds, in point of official authority, according to the able examination of the documentary evidence of the rule, given in a note to the first volume of Mr. Wheaton's Reports, App. note 3.

(*e*) The Immanuel, 2 Rob. Adm. 186, and Rob. Adm. *passim.*

(*a*) Mr. Monroe's Letter to Lord Mulgrave, of September 23d, 1805, and Mr. Madison's Letter to Messrs. Monroe and Pinckney, dated May 17th, 1806.

circumstances or motives which induced another nation to open her ports. The trade must have a direct reference to the hostile efforts of the belligerents, like dealing in contraband, in order to render it breach of neutrality. The rule of 1756, especially in respect to colonial trade, has also been attacked and defended by writers in this country, with ability and learning; and though the rule would seem to have received the very general approbation of British lawyers and statesmen, yet it was not exempt from severe criticism, even in distinguished publications in that country. The principle of the rule of 1756 may, therefore, very fairly be considered as one unsettled and doubtful, and open to future and vexed discussion. The Chief Justice of the United States, in the case of *The Commercen*, (*b*) alluded to the rule, but purposely avoided expressing any opinion on the correctness of the principle. It is very possible that, if the United States should attain that elevation of maritime power and influence which their rapid
* 85 growth and great resources seem to indicate, * and which shall prove sufficient to render it expedient for her maritime enemy (if any such enemy shall ever exist) to open all his domestic trade to enterprising neutrals, we might be induced to feel more sensibly than we have hitherto done, the weight of the arguments of the foreign jurists in favor of the policy and equity of the rule. (*a*)

(*b*) 1 Wheaton, 396.

(*a*) On the subject of neutral trade between the colony and the mother country of a belligerent power, it was a question discussed in the English admiralty, in the case of The Polly, (1800,) whether the fact of a cargo, consisting of Spanish colonial produce, imported from the Havana in an American ship to the United States, and after being landed and duties paid, re-exported in the same vessel to Spain, was sufficient to break the continuity of the voyage from the enemy's colony to the mother country, and legalize the trade by the mere transshipment in the United States. Sir William Scott, in that case, thought that landing the goods and paying the duties was a sufficient test of the *bonâ fides* of the transaction. 2 Rob. Adm. 361. But afterwards, in the cases of The Essex and The Maria, (5 Ibid. 365, 369,) it was held, that merely *touching* at the neutral port, and paying a nominal duty, was a mere evasion, and not sufficient to exempt the voyage from the charge of a direct, continued and unlawful trade, between the mother country and the colony of the enemy. The question is one of intent. Did the *animus importandi* terminate at the intermediate port, or look to an ulterior port? Was it, under the circumstances, a *bonâ fide* importation, ending at the intermediate port, or a mere contrivance to cover the original scheme of the voyage to an ulterior port? This is the true principle of the cases, as declared by Sir William Grant, in the case of The William, 5 Rob. Adm. 385, and recognized in this country. Opinions of the Atorneys-General of the United States, vol. i. 359 – 362, 394 – 396. It

Sailing under the flag and pass of an enemy is another mode by which a hostile character may be affixed to property; for if a neutral vessel enjoys the privileges of a foreign character, she must expect, at the same time, to be subject to the inconveniences attaching to that character. This rule is necessary to prevent the fraudulent mask of enemy's property.[1] But a distinction is made, in the English cases, between the ship and the cargo. Some countries have gone so far as to make the flag and pass of the ship conclusive on the cargo also; but the English courts have never carried the principle to that extent, as to cargoes laden before the war. The English rule is, to hold the ship bound by the character imposed upon it by the authority of the government from which all the documents issue. But goods which have no such dependence upon the authority of the state may be differently considered; and if the cargo be laden in time of peace, though documented as foreign property in the same manner as the ship, the sailing under a foreign flag and pass has not been held conclusive as to the cargo. (*b*) The doctrine of the federal courts in this country has been very strict on this point, and it has been frequently decided, that sailing under the license and passport of protection of the enemy, in furtherance of his views and interests, was, without regard to the object of the voyage or the port of destination, such an act of illegality as sub-

Sailing under foreign flags.

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is understood that the English and American Commissioners at London, in 1806, came to an understanding as to the proper and defined test of a *bonâ fide* importation of cargo into the common stock of the country, and as to the difference between a continuous and an interrupted voyage. But the treaty so agreed on was withheld by President Jefferson from the Senate of the United States, and never ratified. The doctrine of the English admiralty is just and reasonable on the assumption of the British rule, because we have no right to do covertly and insidiously what we have no right to do openly and directly. That rule is, that a direct trade by neutrals, between the mother country and the colonies of her enemy, and not allowed in time of peace, is by the law of nations unlawful. But if that rule be not well founded, all the qualifications of it do not help it; and in the official opinion of Mr. Wirt to the executive department, while he condemns the legality of the rule itself, he approves, as just in the abstract, the English principle of continuity. Opinions of the Attorneys-General, vol. i. 394 – 396.

(*b*) The Elizabeth, 5 Rob. Adm. 2; The Vreede Scholtys, cited in the note to 5 Rob. Adm. 5.

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[1] So the share of a neutral in a ship sailing under Russian colors and with a Russian sea-pass was held to be subject to condemnation. The Industrie, 33 E. L. & Eq. 572; The Primus, 29 E. L. & Eq. 589.

jected both ship and cargo to confiscation as prize of war. (*c*)[2]

* 86 The * federal courts placed the objection to these licenses on the ground of a pacific dealing with the enemy, and as amounting to a contract that the party to whom the license is given should, for that voyage, withdraw himself from the war, and enjoy the repose and blessings of peace. The illegality of such an intercourse was strongly condemned; and it was held, that the moment the vessel sailed on the voyage, with an enemy's license on board, the offence was irrevocably committed and consummated, and that the *delictum* was not done away even by the termination of the voyage, but the vessel and cargo might be seized after arrival in a port of the United States, and condemned as lawful prize.

Property *in transitu.*

Having thus considered the principal circumstances which have been held by the courts of international law to impress a hostile character upon commerce, it may be here observed, that property which has a hostile character at the commencement of the voyage cannot change that character by assignment, while it is *in transitu*, so as to protect it from capture. This would lead to fraudulent contrivances to protect the property from capture, by colorable assignments to neutrals. But if a shipment be made in peace, and not in expectation of war, and the contract lays the risk of the shipment on the neutral consignor, the legal property will remain to the end of the voyage in the consignor. (*a*) During peace, a transfer *in transitu* may be made; but when war is existing or impending, the belligerent rule applies, and the ownership of the property is deemed to continue as it was at the time of the shipment until actual delivery. This illegality of transfer, during or in contemplation of war, is for the sake of the belligerent right,

(*c*) The Julia, 1 Gallison, 605, S. C. 8 Cranch, 181; The Aurora, Ib. 203; The Hiram, Ib. 444; The Ariadne, 2 Wheaton, 143; The Caledonia, 4 Wheaton, 100. That an insurance is void, when made on a voyage so rendered illegal by sailing under an enemy's license, is considered as settled. Colquhoun *v.* N. Y. F. Ins. Co. 15 Johns. 352; Ogden *v.* Barker, 18 Johns. 87; Craig *v.* U. S. Ins. Co. 1 Peters C. C. 410.

(*a*) Packet De Bilboa, 2 Rob. Adm. 133, 134; Anna Catharina, 4 Id. 112.

[2] The cargo of a ship sailing under the enemy's flag, may still retain a neutral character; but if it be the property of one who has acquired a domicil in the enemy's country, it will be no longer considered neutral. El Telegrafo, 1 Newberry Adm. 383.

and to prevent secret transfers from the enemy to neutrals, in fraud of that right, and upon conditions and reservations which it might be impossible to detect. (*b*) So property shipped from a neutral to the enemy's country, under a contract to become the property of the enemy on arrival, may be taken *in transitu* as enemy's property; for capture is considered as delivery. The captor, by the rights of war, stands in the place of the enemy. (*c*) The prize courts will * not allow a neutral and * 87
belligerent, by a special agreement, to change the ordinary rule of peace, by which goods ordered and delivered to the master are considered as delivered to the consignee. All such agreements, though valid in time of peace, are in time of war, or in peace, if made in contemplation of war, and with intent to protect from capture, held to be constructively fraudulent; and if they could operate, they would go to cover all belligerent property, while passing between a belligerent and a neutral country, since the risk of capture would be laid alternately on the consignor or consignee, as the neutral factor should happen to stand in the one or the other of those relations. These principles of the English admiralty have been explicitly recognized and acted upon by the prize courts in this country. The great principles of national law were held to require, that, in war, enemy's property should not change its hostile character, *in transitu;* and that no secret liens, no future elections, no private contracts looking to future events, should be able to cover private property while sailing on the ocean. (*a*) Captors disregard all equitable liens on enemy's property, and lay their hands on the gross tangible property, and rely on the simple title in the name and possession of the enemy. If they were to open the door to equitable claims, there would be no end to discussion and imposition, and the simplicity and celerity of proceedings in prize courts would be lost. (*b*) All reservation of risk to the neutral consignors, in order to protect belligerent consignees,

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(*b*) Vrow Margaretha, 1 Rob. Adm. 336; Jan Frederick, 5 Rob. Adm. 128. See, also, 1 Rob. Adm. 1, 101, 122; 1 Rob. Adm. 16, note; 2 Rob. Adm. 137; 4 Rob. Adm. 32; The Boedes Lust, 5 Rob. Adm. 233; Story J., in The Ann Green, 1 Gallison, 291.

(*c*) The Anna Catharina, 4 Rob. Adm. 107; The Sally Griffiths, 3 Rob. Adm. 300, *in notis.*

(*a*) The Francis, 1 Gallison, 445; 8 Cranch, 335, 359, S. C.

(*b*) The Josephine, 4 Rob. Adm. 25; The Tobago, 5 Ib. 218; The Mariana, 6 Rob. Adm. 24. And the American cases, *ubi supra.* It is the general rule and practice in

are held to be fraudulent; and these numerous and strict rules of the maritime jurisprudence of the prize courts are intended to uphold the rights of maritime capture, and to prevent frauds, and to preserve candor and good faith in the intercourse between belligerent and neutrals. (*c*) The modern cases contain numerous and striking instances of the acuteness of the captors in tracking out deceit, and of the dexterity of the claimants in eluding investigation.(*d*) [1]

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the admiralty, on questions depending upon title to vessels, to look to the legal title, without taking notice of equitable claims. The Sisters, 5 Rob. Adm. 155; The Valiant, English Adm., July, 1839.

(*c*) The prize law, as declared by the English admiralty as early as 1741, and by the decisions of the prize courts in this country, in the case of property *in transitu* during war, is clearly and correctly stated, and ably enforced, by Mr. Duer, in his Treatise on Insurance, vol. i. 478–484.

(*d*) The purchase of ships is a branch of trade neutrals may lawfully engage in, when they act in good faith, though, from its nature, it is liable to great suspicion, and the circumstances of the case are examined in the prize courts with a jealous and sharp vigilance. Duer on Insurance, vol. i. 444, 445, 573.

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[1] If a neutral aver a purchase of the ship from the enemy immediately before the war, the court of prize will require complete proof of the circumstances of the sale. The Ernst. Merck, 33 E. L. & Eq. 594.

LECTURE V.

OF THE RIGHTS OF BELLIGERENT NATIONS IN RELATION TO EACH OTHER.

THE end of war is to procure by force the justice which cannot otherwise be obtained; and the law of nations allows the means requisite to the end. The persons and property of the enemy may be attacked and captured, or destroyed, when necessary to procure reparation or security. There is no limitation to the career of violence and destruction, if we follow the earlier writers on this subject, who have paid too much deference to the violent maxims and practices of the ancients, and the usages of the Gothic ages. They have considered a state of war as a dissolution of all moral ties, and a license for every kind of disorder and intemperate fierceness. An enemy was regarded as a criminal and an outlaw, who had forfeited his rights, and whose life, liberty, and property lay at the mercy of the conqueror. Everything done against an enemy was held to be lawful. He might be destroyed, though unarmed and defenceless. Fraud might be employed as well as force, and force without any regard to the means. (*e*) But these barbarous rights of war have been questioned and checked in the progress of civilization. Public opinion, as it becomes enlightened and refined, condemns all cruelty, and all wanton destruction of life * and property as equally useless and injurious; * 90 and it controls the violence of war by the energy and severity of its reproaches.

Grotius, even in opposition to many of his own authorities, and under a due sense of the obligations of religion and humanity, placed bounds to the ravages of war, and mentioned that many things were not fit and commendable, though they might be strictly lawful; and that the law of nature forbade what the law of nations (meaning thereby the practice of nations) tolerated. He held, that the law of nations prohibited the use of poisoned arms, and the employment of assassins, and

Ancient rules of war condemned.

(*e*) Grotius, b. 3, c. 4 and 5; Puff. lib. 2, c. 16, sec. 6; Bynk. Q. J. Pub. b. 1, c. 1, 2, 3; Burlamaqui, part 4, c. 5.

violence to women, or to the dead, and making slaves of prisoners. (*a*) The moderation which he inculcated had a visible influence upon the sentiments and manners of Europe. Under the sanction of his great authority, men began to entertain more enlarged views of national policy, and to consider a mild and temperate exercise of the rights of war to be dictated by an enlightened self-interest as well as by the precepts of Christianity. And notwithstanding some subsequent writers, as Bynkershoek and Wolfius, restored war to all its horrors, by allowing the use of poison, and other illicit arms, yet such rules became abhorrent to the cultivated reason and growing humanity of the Christian nations. Montesquieu insisted (*b*) that the laws of war gave no other power over a captive than to keep him safely, and that all unnecessary rigor was condemned by the reason and conscience of mankind. Rutherforth (*c*) has spoken to the same effect, and Martens (*d*) enumerates several modes of war, and species of arms, as being now held unlawful by the laws of war.

Vattel (*e*) has entered largely into the subject, and he argues
* 91 with great strength * of reason and eloquence against all unnecessary cruelty, all base revenge, and all mean and perfidious warfare; and he recommends his benevolent doctrines by the precepts of exalted ethics and sound policy, and by illustrations drawn from some of the most pathetic and illustrious examples.

Plunder on land.

There is a marked difference in the right of war, carried on by land and at sea. The object of a maritime war is the destruction of the enemy's commerce and navigation, in order to weaken and destroy the foundations of his naval power. The capture or destruction of private property is essential to that end, and it is allowed in maritime wars by the law and practice of nations. But there are great limitations imposed upon the operations of war by land, though depredations upon private property, and despoiling and plundering the enemy's territory, are still too prevalent, especially when the war is assisted by irregulars. Such conduct has been condemned in all ages by the wise and

(*a*) B. 3, c. 4, 5, 7.
(*b*) Esprit des Lois, b. 15, c. 2.
(*c*) Inst. b. 2, c. 9.
(*d*) Summary, b. 8, c. 3, sec. 3.
(*e*) B. 3, c. 8.

virtuous, and it is usually severely punished by those commanders of disciplined troops who have studied war as a science, and are animated by a sense of duty or the love of fame. We may infer the opinion of Xenophon on this subject, (and he was a warrior as well as a philosopher,) when he states, in the Cyropædia, (*a*) that Cyrus of Persia gave orders to his army, when marching upon the enemy's borders, not to disturb the cultivators of the soil; and there have been such ordinances in modern times, for the protection of innocent and pacific pursuits. (*b*) Vattel condems * very strongly the spoliation of a country without *92

(*a*) Lib. 5.

(*b*) 1 Emerigon, des Ass. 129, 130, 457, refers to ordinances of France and Holland, in favor of protection to fishermen; and to the like effect was the order of the British government in 1810, for abstaining from hostilities against the inhabitants of the Feroe Islands and Iceland. So it is the practice of all civilized nations to consider vessels employed only for the purpose of discovery and science, as excluded from the operations of war. The American Commissioners, (John Adams, Benjamin Franklin, and Thomas Jefferson,) in 1784, submitted to the Prussian Minister a proposition to improve the laws of war, by a mutual stipulation not to molest non-combatants, as cultivators of the earth, fishermen, merchants and traders in unarmed ships, and artists and mechanics inhabiting and working in open towns. These restrictions on the rights of war were inserted in a treaty between the United States and Prussia, in 1785. (See *post*, p. 98.) General Brune stated to the Duke of York, in October, 1799, when an armistice in Holland was negotiating, that if the latter should cause the dikes to be destroyed, and the country to be inundated, when not useful to his own army, or detrimental to the enemy's, it would be contrary to the laws of war, and must draw upon him the reprobation of all Europe, and of his own nation. Nay, even the obstinate defence of a town, if it partake of the character of a mercantile place, rather than a fortress of strength, has been alleged to be contrary to the laws of war. (See the correspondence between General Laudohn and the Governor of Breslau, in 1760. Dodsley's Ann. Reg. 1760.) So, the destruction of the forts and warlike stores of the besieged in the post of Almeida, by the French commander, when he abandoned it with his garrison by night, in 1811, is declared by General Sarazin, in his history of the Peninsular War, to have been an act of wantonness which justly placed him without the pale of civilized warfare. When a Russian army, under the command of Count Diebitsch, had penetrated through the passes of the Balkan to the plains of Romelia, in the summer of 1829, the Russian commander gave a bright example of the mitigated rules of modern warfare, for he assured the Mussulmen that they should be entirely safe in their persons and property, and in the exercise of their religion; and that the Mussulmen authorities in the cities, towns, and villages might continue in the exercise of their civil administration for the protection of person and property. The inhabitants were required to give up their arms, as a deposit, to be restored on the return of peace, and in every other respect they were to enjoy their property and pacific pursuits as formerly. This protection and full security to the persons and property of the peaceable inhabitants of conquered towns and provinces are according to the doctrine and declared practice of modern civilized nations. (See Dodsley's Ann. Reg. 1772, p. 37.)

palpable necessity; and he speaks with a just indignation of the burning of the Palatinate by Turenne, under the cruel instructions of Louvois, the war minister of Louis XIV. (*a*) The general usage now is, not to touch private property upon land, without making compensation, unless in special cases, dictated by the necessary operations of war, or when captured in places carried by storm, and which repelled all the overtures for a capitulation. Contributions are sometimes levied upon a conquered country, in lieu of confiscation of property, and as some indemnity for the expenses of maintaining order and affording protection. (*b*)

(*a*) Vattel, b. 3, c. 9, sec. 167.

(*b*) Vattel, b. 2, c. 8, sec. 147; c. 9, sec. 165; Scott's Life of Napoleon, vol. iii. 58. Contributions exacted from the inhabitants by the armies of an invader, without payment, is contrary to the ordinary usages of modern warfare, though the practice is not consistent. The campaigns of revolutionary France, and of Napoleon, in modern Europe, were melancholy exceptions, of the severest character. Upon the invasion of Mexico by the armies of the United States, in 1846, the American Secretary of War (Marcy) instructed General Taylor (September 22d, 1846) to abstain from appropriating private property to the public uses, until purchased at a fair price, though he said that was in some respects going far beyond the common requirements of civilized warfare, and that an invading army had the unquestionable right to draw its supplies from the enemy without paying for them, and to require contributions for its support, and to make the enemy feel the weight of the war. He further observed, that upon the liberal principles of civilized warfare, either of three modes might be pursued in relation to obtaining supplies from the enemy; first, to purchase them on such terms as the inhabitants of the country might choose to exact; second, to pay a fair price, without regard to the enhanced value resulting from the presence of a foreign army; and, third, to require them as contributions, without paying or engaging to pay therefor; that the last mode was the ordinary one, and General Taylor was instructed to adopt it, if in that way he was satisfied he could get abundant supplies for his forces. The previous instructions in that campaign had been to abstain from appropriating private property to the public use without purchase, at a fair price; but the instructions had now, in the progress of the campaign, risen to a severe character. The principle of kindness and liberality towards the enemy seems to be of a flexible character, and to be swayed by considerations of policy and circumstances. The President of the United States, (James K. Polk,) in his letter to the Secretary of the Treasury, of the 23d March, 1847, declared the right of the conqueror to levy contributions upon the enemy, in their seaports, towns, or provinces, which may be in his military possession by conquest, and to apply the same to defray the expenses of the war. He further declared, that the conqueror possessed the right to establish a temporary military government over such seaports, towns, or provinces, and to prescribe the terms of commerce with such places; that he might, in his discretion, exclude all trade, or impose terms upon it, — such, for instance, as a prescribed rate of duties on tonnage and imports. The President of the United States, therefore, with a view to impose a burden on the enemy, and deprive him of the revenue to be derived from trade, and secure it to the United States, ordered that all the ports and places in Mexico, in the actual possession of the land and naval forces of the United States, by conquest, should be opened, while the mili-

If the conqueror goes beyond these limits wantonly, or when it is not clearly indispensable to the just purposes of war, and seizes private * property of pacific persons for the sake of * 93 gain, and destroys private dwellings, or public edifices, devoted to civil purposes only; or makes war upon monuments of art and models of taste, he violates the modern usages of war, and is sure to meet with indignant resentment, and to be held up to the general scorn and detestation of the world. (*a*)

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tary occupation continued, to the commerce of all neutral nations, as well as of the United States, in articles not contraband of war, upon the payment of a prescribed tariff of duties and tonnage, prepared under the instructions of the President, and by him adopted, and to be enforced by the military and naval commanders. All these rights of war undoubtedly belong to the conqueror or nation who holds foreign places and countries by conquest; but the exercise of those rights and powers, except those that temporarily arise from necessity, belong to that power in the government to which the prerogative of war is constitutionally confided. The President of the United States, in his official letter to the Secretary of the Navy, of March 31st, 1847, claimed and exercised, as being charged by the Constitution with the prosecution of the war, this belligerent right to levy military contributions upon the enemy, and to collect and apply the same towards defraying the expenses of the war, and to open the Mexican ports for that purpose, on a footing favorable to neutral commerce. The whole execution of the commercial regulations was placed under the control of the military and naval forces, and, with the policy of blockading some, and opening other Mexican ports, to compel the whole commerce for the supply of Mexico to pass under the control of the American forces, subject to the contributions, exactions, and duties to be imposed. (See President Polk's Letter of March 31, 1847, to the Secretary of the Navy, and his letter of March 23d, 1847, to the Secretary of the Treasury, and the Letter to Mr. Walker, of the 30th March, 1847, to the President, containing a scale of duties to be collected, as a military contribution, in the ports of Mexico, and with a recommendation that the Mexican coastwise trade, and the interior trade, above ports of entry, be confined to American vessels, and that, in all other respects, the ports of Mexico in our possession be freely opened.) These fiscal and commercial regulations, issued and enforced at the mere pleasure of a President, would seem to press strongly upon the constitutional power of Congress to *raise and support armies*, to *lay and collect taxes, duties*, and imports, and to *regulate commerce with foreign nations*, and to *declare war*, and make *rules for the government and regulation of the land and naval forces*, and *concerning captures on land and water*, and *to define offences against the law of nations*. Though the constitution vests the executive power in the President, and declares him to be Commander-in-Chief of the army and navy of the United States, these powers must necessarily be subordinate to the legislative power in Congress. It would appear to me to be the policy or true construction of this simple and general grant of executive power to the President, not to suffer it to interfere with those specific powers of Congress which are more safely deposited in the legislative department, and that the powers thus assumed by the President do not belong to him, but to Congress.

(*a*) Vattel, b. 3, c. 9, sec. 168. In the case of The Marquis de Somerueles, (Stewart's Vice-Adm. Rep. 482,) the enlightened judge of the vice-admiralty court at Halifax restored to the Academy of Arts, in Philadelphia, a case of Italian paintings and prints, captured by a British vessel in the war of 1812, on their passage to the United States;

Cruelty to prisoners, and barbarous destruction of private property, will provoke the enemy to severe retaliation upon the innocent. Retaliation is said by Rutherforth (*b*) not to be a justifiable cause for putting innocent prisoners or hostages to death; for no individual is chargeable, by the law of nations, with the guilt of a personal crime, merely because the community of which he is a member is guilty. He is only responsible as a member of the state, in his property, for reparation in damages for the acts of others; and it is on this principle that, by the law of nations, private property may be taken and appropriated in war. Retaliation, to be just, ought to be confined to the guilty individuals, who may have committed some enormous violation of public law. On this subject of retaliation, Professor Martens is not so strict. (*c*) While he admits that the life of an innocent man cannot be taken, unless in extraordinary cases, he declares that cases will sometimes occur, when the established usages of war are violated, and there are no other means, except the influence of retaliation, of restraining the enemy from further excesses. Vattel speaks
* 94 of retaliation as * a sad extremity, and it is frequently threatened without being put in execution, and probably, without the intention to do it, and in hopes that fear will operate to restrain the enemy. Instances of resolutions to retaliate on innocent prisoners of war occurred in this country during the Revolutionary war, as well as during the war of 1812; but there was no instance in which retaliation, beyond the measure of severe confinement, took place in respect to prisoners of war. (*a*)

Law of retaliation.

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and he did it "in conformity to the law of nations, as practised by all civilized countries," and because "the arts and sciences are admitted to form an exception to the severe rights of warfare." Works of art and taste, as in painting and sculpture, have, by the modern law of nations, been held sacred in war, and not deemed lawful spoils of conquest. When Frederick II. of Prussia took possession of Dresden, as conqueror, in 1756, he respected the valuable picture gallery, cabinets, and museums of that capital, as not falling within the rights of a conqueror. But Bonaparte, in 1796, compelled the Italian states and princes, including the Pope, to surrender their choicest pictures and works of art, to be transported to Paris. The *chef d'œuvres* of art of the Dutch and Flemish schools, and in Prussia, were acquired by France in the same violent way. This proceeding is severely condemned by distinguished historians, as an abuse of the power of conquest, and a species of military contribution contrary to the usages of modern civilized warfare. Allison's History of Europe, vol. iii. 42; Sir Walter Scott's Life of Napoleon, vol. iii. 58 – 68.

(*b*) Inst. b. 2, c. 9.

(*c*) Summary of the Law of Nations, b. 8, c. 1, sec. 3, note.

(*a*) Journals of Congress under the confederation, vol. ii. p. 245; vol. vii. pp. 9

Although a state of war puts all the subjects of the one nation in a state of hostility with those of the other, yet, by the customary law of Europe, every individual is not allowed to fall upon the enemy. If subjects confine themselves to simple defence, they are to be considered as acting under the presumed order of the state, and are entitled to be treated by the adversary as lawful enemies; and the captures which they make in such a case are allowed to be lawful prize. But they cannot engage in offensive hostilities, without the express permission of their sovereign; and if they have not a regular commission, as evidence of that consent, they run the hazard of being treated by the enemy as lawless banditti, not entitled to the protection of the mitigated rules of modern warfare. (*b*)

It was the received opinion in ancient Rome, in the times of Cato and Cicero, (*c*) that one who was not regularly enrolled as a soldier, could not lawfully kill an enemy. But the law of Solon, by which individuals were permitted to form associations for plunder, was afterwards introduced into the Roman law, and has been transmitted to us as * part of their system. (*a*) Dur- * 95
ing the lawless confusion of the feudal ages, the right of making reprisals was claimed and exercised without a public commission. It was not until the fifteenth century that commissions were made necessary, and were issued to private subjects in time of war, and that subjects were forbidden to fit out vessels to cruise against enemies without license. There were ordinances in Germany, France, Spain, and England to that effect. (*b*) It is now the practice of maritime states to make use of the voluntary aid of individuals against their enemies as auxiliary to the public force; and Bynkershoek says, that the Dutch formerly employed no vessels of war but such as were owned by private persons, and to whom the government allowed a

Commission to cruise necessary.

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and 147; vol. viii. p. 10; British Orders in Canada, of October 27th and December 12th, 1813, and President's Message to Congress, of December 7th, 1813, and of October 28th, 1814.

(*b*) Bynk. Q. J. Pub. b. 1, c. 20; Vattel, b. 3, c. 15, sec. 226; Journals of Congress, vol. vii. 187; Martens, b. viii. c. 3, sec. 2.

(*c*) De Off. b. 1, c. 11.

(*a*) Dig. 47, 22, 4; Bynk. Q. J. Pub. b. 1, c. 18.

(*b*) Code des Prizes, tom. i. p. 1; Martens on Privateers, p. 18; Robinson's Collectanea Maritima, p. 21.

proportion of the captured property, as well as indemnity from the public treasury. Vessels are now fitted out and equipped by private adventurers, at their own expense, to cruise against the commerce of the enemy. They are duly commissioned, and it is said not to be lawful to cruise without a regular commission. (*c*) Sir Matthew Hale held it to be depredation in a subject to attack the enemy's vessels, except in his own defence, without a commission. (*d*) The subject has been repeatedly discussed in the Supreme Court of the United States, (*e*) and the doctrine of the law of nations is considered to be, that private citizens cannot acquire a title to hostile property, unless seized under a commission, but they may still lawfully seize hostile property in their own
*96 defence. If they depredate upon the enemy without *a commission, they act upon their peril, and are liable to be punished by their own sovereign; but the enemy is not warranted to consider them as criminals, and, as respects the enemy they violate no rights by capture.

Such hostilities, without a commission, are, however, contrary to usage, and exceedingly irregular and dangerous, and they would probably expose the party to the unchecked severity of the enemy; but they are not acts of piracy unless committed in time of peace. Vattel, indeed, says, (*a*) that private ships of war, without a regular commission, are not entitled to be treated like captures made in a formal war. The observation is rather loose, and the weight of authority undoubtedly is, that non-commissioned vessels of a belligerent nation may at all times capture hostile ships, without being deemed, by the law of nations, pirates. They are lawful combatants, but they have no interest in the prizes they may take, and the property will remain subject to condemnation in favor of the government of the captor, as *droits of the admiralty*. It is said, however, that in the United States the property is not strictly and technically condemned upon that principle, but *jure reipublicæ;* and it is the settled law of the United States,

(*c*) Bynk. *ub. sup.* Martens, b. 8, c. 3, sec. 2; Judge Croke, in the case of The Curlew, Stewart Vice-Adm. 326.

(*d*) Harg. Law T. 245, 246, 247.

(*e*) Brown *v.* United States, 8 Cranch, 132–135; The Nereide, 9 Cranch, 449; The Dos Hermanos, 2 Wheaton, 76, and 10 Wheaton, 306; The Amiable Isabella, 6 Wheaton, 1.

(*a*) B. 3, c. 15, sec. 226.

that all captures made by non-commissioned captors are made for the government. (*b*)

In order to encourage privateering, it is usual to allow the owners of private armed vessels to appropriate to themselves the property, or a large portion of the property they may capture; and to afford them and the crews other facilities * and rewards for honorable and successful efforts. * 97 This depends upon the municipal regulations of each particular power; and, as a necessary precaution against abuse, the owners of privateers are required, by the ordinances of the commercial states, to give adequate security that they will conduct the cruise according to the laws and usages of war and the instructions of the government, and that they will regard the rights of neutrals, and bring their prizes in for adjudication. These checks are essential to the character and safety of maritime nations. (*a*) Privateering, under all the restrictions which have been adopted, is very liable to abuse. The object is, not fame or chivalric warfare, but plunder and profit. The discipline of the crews is not apt to be of the highest order, and privateers are often guilty of enormous excesses, and become the scourge of neutral commerce. (*b*) They are sometimes manned and officered by foreigners, having no permanent connection with the country, or interest in its cause. This was a complaint made by the United States, in 1819, in relation to irregularities and acts of atrocity committed by private armed vessels sailing under the flag of Buenos Ayres. (*c*) Under the best regulations, the business tends strongly to blunt the sense of private right, and to nourish a law-

Privateering.

(*b*) Com. Dig. tit. Admiralty, E. 3; 2 Wood. Lec. 432; The Georgiana, 1 Dod. Adm. 397; The Brig Joseph, 1 Gallison, 545; The Dos Hermanos, 10 Wheaton, 306. The American Commissioners at the court of France, in 1778, (Benjamin Franklin, Arthur Lee, and John Adams,) in a letter to the French government, laid down accurately and with precision the law in the text as to capture of enemy's property without a commission. Diplomatic Correspondence, by J. Sparks, vol. i. 443.

(*a*) Bynk. Q. J. Pub. b. 1, c. 19; Journals of Congress, 1776, vol. ii. 102, 114; Acts of Congress of June 26th, 1812, c. 107, and April 20th, 1818, c. 83, sec. 10; President's Instructions to private armed vessels, 2 Wheaton, App. p. 80; Danish Instructions of March 10th, 1810; Hall's L. J. vol. iv. 263, and App. to 5 Wheaton, 91; Vattel, b. 3, c. 15, sec. 229; Martens's Summ. 289, 290, note; Ord. of Buenos Ayres, May, 1817, in App. to 4 Wheaton, 28; Digest of the Code of British Instructions, App. to 5 Wheaton, 129.

(*b*) Reports of the United States Secretary of State, March 2d, 1794, and June 21st, 1797.

(*c*) Mr. Adams's Letter of 1st January, 1819, to Mr. De Forrest, and his Official Report of 28th January, 1819.

less and fierce spirit of rapacity. Efforts have been made, * 98 from time to time, to abolish * the practice. In the treaty of amity and commerce between Prussia and the United States, in 1785, it was stipulated, that in case of war, neither party should grant commissions to any private armed vessels to attack the commerce of the other. But the spirit and policy of maritime warfare will not permit such generous provisions to prevail. That provision was not renewed with the renewal of the treaty. A similar attempt to put an end to the practice was made in the agreement between Sweden and Holland, in 1675, but the agreement was not performed. The French legislature, soon after the breaking out of the war with Austria, in 1792, passed a decree for the total suppression of privateering; but that was a transitory act, and it was soon swept away in the tempest of the revolution. The efforts to stop the practice have been very feeble and fruitless, notwithstanding that enlightened and enlarged considerations of national policy have shown it to be for the general benefit of mankind to surrender the licentious practice, and to obstruct, as little as possible, the freedom and security of commercial intercourse among the nations. (*a*) [1]

(*a*) 1 Emerigon, des Ass. 129 – 132, 457; Mably's Droit Public, c. 12, sec. 1; Edinburgh Review, vol. viii. pp. 13 – 15; North American Review, N. S. vol. ii. p. 166. During the war between the United States and Great Britain, the legislature of New York went so far as to pass an act *to encourage privateering associations*, by authorizing any five or more persons, who should be desirous to form a company for the purpose of annoying the enemy, and their commerce, by means of private armed vessels, to sign and file a certificate, stating the name of the company and its stock, &c., and that they and their successors should thereupon be a *body politic and corporate*, with the ordinary corporate powers. Laws, N. Y. 38 Sess. c. 12, Oct. 21st, 1814.

[1] See the despatches addressed to the American Secretary of State, in 1854, by the Chargés d'Affaires, of Denmark and of Sweden and Norway. (Ex. Doc. 1st Sess. 33d Cong. H. Doc. No. 103.) In the late Russian war these nations maintained the strictest neutrality; nor, indeed, did any of the European powers permit their subjects to accept letters of marque from the belligerent nations.

At the Congress of Paris, which put an end to the late Russian war, in April, 1856, the plenipotentiaries of Great Britain, Austria, France, Russia, Prussia, Sardinia, and Turkey adopted the following solemn declaration:

1. Privateering is and remains abolished.

2. The neutral flag covers enemy's goods, with the exception of contraband of war.

3. Neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag.

4. Blockades, in order to be binding, must be effective; that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.

And it was agreed that the powers which should adopt this declaration could not

It has been a question, whether the owners and officers of private armed vessels were liable, in damages, for illegal conduct beyond the amount of the security given. Bynkershoek (*b*) has discussed this point quite at large, and he concludes that the owner, master, and sureties are jointly and severally liable, *in solido*, for the damages incurred; and that the master and owners are liable to the whole extent of the injury, though it may exceed the value of the privateer and her equipment, but that the sureties are responsible only to the amount of the sums for which they become bound. This rule is liable to the modifications of municipal regulations; * and though the French * 99
law of prize was formerly the same as the rule laid down by Bynkershoek, yet the new commercial code of France (*a*) exempts the owners of private armed vessels in time of war from responsibility for trespasses at sea, beyond the amount of the security they may have given, unless they were accomplices in the tort. The English statute of 7 Geo. II. c. 15 is to the same effect, in respect

Damages for illegal acts.

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thereafter enter into any arrangement in regard to the application of the right of neutrals in time of war, which did not comprise all the four principles of the declaration.

The French government communicated this declaration to the government of the United States, in order to obtain its assent thereto. But the United States refused to adopt the declaration, unless the first principle of the declaration should be amended by adding thereto these words: "And that the private property of the subjects or citizens of a belligerent on the high seas shall be exempted from seizure by public armed vessels of the other belligerent, except it be contraband." The United States government considered, that, if the first principle of the declaration were adopted without the proposed amendment, the states which kept small naval forces would be at the mercy of those which would adopt the policy and have the means of keeping up large navies. See Despatch of Mr. Marcy to the Count de Sartiges, of July 28th, 1856. Not only the United States, but Spain and Mexico also refused their consent; and so far as these powers are concerned, privateering — that is, the employment of private cruisers commissioned by the state — is still a perfectly legitimate mode of warfare. Roman Law by Lord Mackenzie (ed. 1862), 58.

The French Minister of Foreign Affairs made a report to the Emperor of the French, that, besides the states represented at the Congress of Paris, the following governments had declared their intention to adhere to the four principles of the declaration: Baden, Bavaria, Belgium, Brazil, Duchy of Brunswick, Chili, the Argentine Confederation, the Germanic Confederation, Denmark, the Two Sicilies, Ecuador, the Roman States, Greece, Gautemela, Hayti, Hamburg, Hanover, the Two Hesses, Lubeck, Mecklenburg-Strelitz, Mecklenburg-Schwerin, Nassau, Oldenburg, Parma, Holland, Peru, Portugal, Saxony, Saxe-Altenburg, Saxe-Coburg-Gotha, Saxe-Meiningen, Saxe-Weimar, Sweden, Switzerland, Tuscany, and Wurtemberg. See the Report in the London Times for July 17, 1858.

(*b*) Q. J. Pub. b. 1, c. 19.

(*a*) Code de Commerce, art. 217.

to embezzlements in the merchants' service. It limits the responsibility to the amount of the vessel and freight, but it does not apply to privateers in time of war; and where there is no positive local law on the subject, (and there is none with us,) the general principle is, that the liability is commensurate with the injury. This was the rule, as declared by the Supreme Court of the United States, in *Del Col* v. *Arnold;* (*b*) and though that case has since been shaken as to other points, (*c*) it has not been disturbed as to the point before us. We may, therefore, consider it to be a settled rule of law and equity, that the measure of damages is the value of the property unlawfully injured or destroyed, and that each individual owner is responsible for the entire damages, and not ratably *pro tanto*. (*d*)

Vattel admits, (*e*) that an individual may, with a safe conscience, serve his country by fitting out privateers; but he holds it to be inexcusable and base to take a commission from a foreign prince to prey upon the subjects of a state in amity with his
* 100 native country. The laws of the United * States have made ample provision on this subject, and they may be considered as in affirmance of the law of nations, and as prescribing specific punishment for acts which were before unlawful. (*a*) An act of Congress prohibits citizens to accept, within the jurisdiction of the United States, a commission, or for any person not transiently within the United States, to consent to be retained or enlisted, to serve a foreign state in war, against a government in amity with us. It likewise prohibits American citizens from being concerned, without the limits of the United States, in fitting out, or otherwise assisting, any private vessel of war, to cruise against the subjects of friendly powers. (*b*) Similar prohibitions are contained in the

(*b*) 3 Dallas, 333.

(*c*) 1 Wheaton, 259; 1 Paine C. C. 111, to the same point.

(*d*) The Karasan, 5 Rob. Adm. 291; The Anna Maria, 2 Wheaton, 327. But the owners of a privateer are not liable civilly beyond the security given by law, and the loss of a vessel, for *piratical* acts committed by the officers and crew of the privateer. They are only liable, by the maritime law, for the conduct of the officers and crew, while in *the execution of the business of the cruise.* Dias *v.* Privateer Revenge, 3 Wash. C. C. 262. The New York scheme (see *sup.* p. 98, n.) of making privateering companies actual corporations or body politic, would seem to exempt the members from from the personal responsibility ordinarily incident to the owners of privateers.

(*e*) B. 3, c. 15, sec. 229.

(*a*) Talbot *v.* Janson, 3 Dallas, 133; Brig Alerta *v.* Blas Moran, 9 Cranch, 359.

(*b*) Act of Congress of 20th April, 1818, c. 83.

laws of other countries; (*c*) and the French ordinance of the marine of 1681 treated such acts as piratical. The better opinion is, that a cruiser, furnished with commissions from two different powers, is liable to be treated as a pirate; for, though the two powers may be allies, yet one of them may be in amity with a state with whom the other is at war. (*d*) In the various treaties between the powers of Europe in the last two centuries, and in the several treaties between the United States and France, Holland, Sweden, Prussia, Great Britain, Spain, Columbia, Chili, &c., it is declared, that no subject or citizen of either nation shall accept a commission or letter of marque, to assist an enemy in hostilities against the other, under pain of being treated as a pirate.

Prizes.

The right to all captures vests primarily in the sovereign, and no individual can have any interest in a prize, whether made by a public or private armed vessel, but what he receives * under the grant of the state. This is a general * 101 principle of public jurisprudence, *bello parta cedunt reipublicæ*, and the distribution of the proceeds of prizes depends upon the regulations of each state; and unless the local laws have otherwise provided, the prizes vest in the sovereign. (*a*) But the general practice, under the laws and ordinances of the belligerent governments, is, to distribute the proceeds of captured property, when duly passed upon, and condemned as prize, (and whether captured by public or private commissioned vessels,) among the captors, as a reward for bravery, and a stimulus to exertion. (*b*)

When a prize is taken at sea, it must be brought, with due care, into some convenient port, for adjudication by a competent court;

(*c*) See the Austrian Ordinance of Neutrality of August 7, 1803, art. 2, 3. By the law of Plymouth Colony, in 1682, it was declared to be felony to commit hostilities on the high seas, under the flag of any foreign power, upon the subjects of another foreign power in amity with England. Bailie's Historical Memoir, vol. ii. part 4, 35. The same acts were declared to be felony by a law of the Colony of New York, in 1699. Smith's edition of the Laws of the Colony, vol. i. 25.

(*d*) Valin's Comm. tom. ii. 235, 236; Bynkershoek, b. 1, c. 17, and note by Duponceau to his translation, p. 129; Sir L. Jenkins's Works, 714. See *post*, pp. 188, 191.

(*a*) Grotius, b. 3, c. 6; Vattel, b. 3, c. 9, sec. 164; The Elsebe, 5 Rob. Adm. 173; Home *v.* Earl Camden, 2 H. Blacks. 533. At common law, the goods taken from an enemy belong to the captor. Finch's Law, 28, 178; 12 Mod. 135; 1 Wils. 213. See *infra*, p. 357.

(*b*) Lord Loughborough, 1 H. Blacks. 189–191; Wheaton's R. vol. ii. App. p. 7, note c, and p. 71.

though, strictly speaking, as between the belligerent parties, the title passes, and is vested when the capture is complete, and that was formerly held to be complete and perfect when the battle was over, and the *spes recuperandi* was gone. Voet, in his Commentaries upon the Pandects, (*c*) and the authors he refers to, maintain with great strength, as Lord Mansfield observes in *Goss* v. *Withers*, (*d*) that occupation, of itself, transferred the title to the captor, *per solam occupationem dominium prædæ hostibus acquiri.* The question never arises but between the original owner and a neutral purchasing from the captor, and between the original owner and a recaptor. If a captured ship escapes from the captor, or is retaken, or if the owner ransoms her, his property is thereby revested. But if neither of these events happen, the question as to the change of title is open to dispute, and many arbitrary lines have been drawn, partly from policy, to pre-
* 102 vent too easy dispositions of the property to neutrals * and partly from equity, to extend the *jus postliminii* in favor of the owner. Grotius, (*a*) and many other writers, and some marine ordinances, as those of Louis XIV. and of Congress during the American war, (*b*) made twenty-four hours' quiet possession by the enemy the test of title by capture. Bynkershoek (*c*) says that such a rule is repugnant to the laws and customs of Holland; and he insists, that a firm possession, at any time, vests the property in the captor, and that ships and goods brought *infra præsidia*, do most clearly change the property. But by the modern usage of nations, neither the twenty-four hours' possession, nor the bringing the prize *infra præsidia*, is sufficient to change the property in the case of a maritime capture. A judicial inquiry must pass upon the case, and the present enlightened practice of commercial nations has subjected all such captures to the scrutiny of judicial tribunals, as the only sure way to furnish due proof that the seizure was lawful. The property is not changed in favor of a neutral vendee or recaptor, so as to bar the original owner, until a regular sentence of condemnation has been pronounced by some court of

(*c*) Tom. ii. p. 1155.

(*d*) 2 Burr. 683.

(*a*) B. 3, c. 6.

(*b*) Valin, lib. 3, tit. 9, art. 8; Journals of the Confederation Congress, March 27th, 1781, vol. vii. p. 59.

(*c*) Q. J. Pub. b. 1, c. 4 and 5; Martens's Summary, b. 8, c. 3, sec. 11, S. P.

competent jurisdiction, belonging to the sovereign of the captor ;[1] and the purchaser must be able to show documentary evidence of that fact, to support his title. Until the capture becomes invested with the character of prize by a sentence of condemnation, the right of property is in abeyance, or in a state of legal sequestration. It cannot be alienated or disposed of, but the possession of it by the government of the captor is a trust for the benefit of those who may be ultimately entitled. This salutary rule, and one so necessary to check irregular conduct and individual outrage, has been long established in the English admiralty, (*d*) * and it * 103 is now everywhere recognized as the law and practice of nations. (*a*)

The condemnation must be pronounced by a prize court of the government of the captor sitting either in the country of the captor or of his ally. The prize court of an ally cannot condemn. Prize or no prize, is a question belonging exclusively to the courts of the country of the captor. The reason of this rule is said to be, (*b*) that the sovereign of the captors has a right to inspect their behavior, for he is answerable to other states for the acts of the captor. The prize court of the captor may sit in the territory of the ally, but it is not lawful for such a court to act in a neutral territory. Neutral ports are not intended to be auxiliary to the

(*d*) Carth. 423 ; 10 Mod. 79 ; 12 Mod. 143 ; 2 Burr. 694 ; 3 Rob. Adm. 97, *in notis ;* 1 Rob. Adm. 139.

(*a*) The Flad Oyen, 1 Rob. Adm. 135 ; The Henrick and Maria, 4 Rob. Adm. 45 ; Vattel, b. 3, c. 15, sec. 216 ; Heineccii Opera, edit. Geneva, 1744, tom. ii. 310, 360 ; 5 Rob. Adm. 294 ; Doug. 591 ; 8 Cranch, 226 ; 4 Wheaton, 298 ; 6 Taunt. 25 ; 2 Dallas, 1, 2, 4. Every court has the right to inquire into the competency of the jurisdiction of a foreign court to condemn captured property, and if it has none, the sentence is null. The consul of a belligerent in a neutral country has no power to condemn prizes. See cases, Abbot on Shipping, 5th Amer. edit., Boston, 1846, pp. 30 – 32. But a prize carried into the country of an ally may be condemned there, and even by a consul belonging to the country of the captors. Id. p. 33.

(*b*) Rutherforth's Institutes, b. 2, c. 9.

[1] By the first section of the third article of the Constitution, a court can be erected only by act of Congress. Therefore, a chaplain of the navy, commissioned by the President to exercise admiralty jurisdiction, was not invested with competent judicial authority to determine a question of prize. Jecker *v.* Montgomery, 13 How. U. S. 498.

Where a captor has exercised prudence and good faith, he will not be held guilty of misconduct in omitting to send home his prize for adjudication. Jecker *v.* Montgomery, 18 How. U. S. 110 ; Fay *v.* Montgomery, 1 Curtis C. C. 266.

operations of the power at war; and the law of nations has clearly ordained, that a prize court of a belligerent captor cannot exercise jurisdiction in a neutral country. This prohibition rests not merely on the unfitness and danger of making neutral ports the theatre of hostile proceedings, but it stands on the ground of the usage of nations. (*c*)

It was for some time supposed that a prize court, though sitting in the country of its own sovereign, or of his ally, had no jurisdiction over prizes lying in a neutral port, because the court wanted that possession which was deemed essential to the exercise of a jurisdiction in a proceeding *in rem*. The principle was admitted to be correct by Sir William Scott, in the case of
*104 *The Henrick and Maria*, (*d*) and he acted *upon it in a prior case. (*a*) But he considered that the English admiralty had gone too far, in supporting condemnations in England, of prizes abroad in a neutral port, to permit him to recall the vicious practice of the court to the acknowledged principle; and the English rule is now definitively settled, agreeably to the old usage and the practice of other nations. The Supreme Court of the United States has followed the English rule, and it has held valid the condemnations, by a belligerent court, of prizes carried into a neutral port, and remaining there. This was deemed the most convenient practice for neutrals, as well as for the parties at war; and though the prize was in fact within a neutral jurisdiction, it was still to be deemed under the control, or *sub potestate*, of the captor. (*b*)

Ransom.

Sometimes circumstances will not permit property captured at sea to be sent into port; and the captor, in such cases, may either destroy it, or permit the original owner to ransom it. It was formerly the general custom to redeem prop-

(*c*) Glass *v.* The Sloop Betsey, 3 Dallas, 6; The Flad Oyen, 1 Rob. Adm. 135; Havelock *v.* Rockwood, 8 Term Rep. 268; Oddy *v.* Bovill, 2 East, 475; Answer to the Prussian Memorial, 1753; L'Invincible, 1 Wheaton, 238; The Estrella, 4 Wheaton, 298; The Comet, 5 Rob. Adm. 285; The Victoria, Edw. Adm. 97.

(*d*) 4 Rob. Adm. 43.

(*a*) Note to the case of The Herstelder, 1 Rob. Adm. 100, Philadelphia edit. 1810.

(*b*) 6 Rob. Adm. 138; note to the case of The Schooner Sophie; Smart *v.* Wolff, 3 Term Rep. 283; Bynk. by Dupondeau, p. 38, note; Hudson *v.* Guestier, 4 Cranch, 293; Williams *v.* Armroyd, 7 Cranch, 423. In the treaty between the United States and the Republic of Colombia, in 1825, art. 21, and of Chili, in 1832, art. 21, it was agreed, that the established courts for prize causes in the country to which the prize may be conducted, should alone take cognizance of them.

erty from the hands of the enemy by ransom; and the contract is undoubtedly valid, when municipal regulations do not intervene. It is now but little known in the commercial law of England, for several statutes in the reign of Geo. III. absolutely prohibited to British subjects the privilege of ransom of property captured at sea, unless in a case of extreme necessity, to be judged of by the court of admiralty. (*c*) A ransom bill, when not locally prohibited, is a war contract, protected by good faith and the law of nations; and notwithstanding that the contract is considered in England as tending to relax the energy of war, and
* deprive cruisers of the chance of recapture, it is, in many * 105
views, highly reasonable and humane. Other maritime nations regard ransoms as binding, and to be classed among the few legitimate *commercia belli*. They have never been prohibited in this country; and the act of Congress of August 2, 1813, interdicting the use of British licenses or passes, did not apply to the contract of ransom. (*a*)

The effect of a ransom is equivalent to a safe-conduct granted by the authority of the state to which the captor belongs, and it binds the commanders of other cruisers to respect the safe-conduct thus given; and under the implied obligation of the treaty of alliance, it binds equally the cruisers of the allies of the captor's country. (*b*) From the very nature of the connection between allies, their compacts with the common enemy must bind each other, when they tend to accomplish the objects of the alliance. If they did not, the ally would reap all the fruits of the compact, without being subject to the terms and conditions of it; and the enemy with whom the agreement was made would be exposed, in regard to the ally, to all the disadvantages of it, without participating in the stipulated benefits. Such an inequality of obligation is contrary to every principle of reason and justice. (*c*)

The safe-conduct implied in a ransom bill requires that the vessel should be found within the course prescribed, and within the time limited by the contract, unless forced out of her course

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(*c*) Chitty Comm. Law, 428.

(*a*) Azuni on Maritime Law, c. 4, art. 6; 1 Emerigon, c. 12, sec. 21; 2 Valin, art. 66, p. 149; Le Guidon, c. 6, art. 2; Grotius, b. 3, c. 19; Goodrich *v.* Gordon, 15 Johns. 6.

(*b*) Miller *v.* The Resolution, 2 Dallas, 15.

(*c*) Miller *v.* The Resolution, 2 Dallas, 15; Pothier, Traité du Droit de Propriété, No. 134.

by stress of weather, or unavoidable necessity. (*d*) If the vessel ransomed perishes by a peril of the sea, before arrival in port, the ransom is, nevertheless, due, for the captor has not insured
*106 the prize against the perils *of the sea, but only against recapture by cruisers of his own nation, or of the allies of his country. If there should be a stipulation in the ransom contract, that the ransom should not be due if the vessel was lost by sea perils, the provision ought to be limited to total losses by shipwreck, and not to mere stranding, which might lead to frauds, in order to save the cargo at the expense of the ship. (*a*)

If the vessels should be recaptured, out of the route prescribed by the contract for her return, or after the time allowed for her return, and be adjudged lawful prize, it has been made a question whether the debtors of the ransom are discharged from their contract. Valin (*b*) says, that, according to the constant practice, the debtors are discharged in such case, and the price of the ransom is deducted from the proceeds of the prize, and given to the first captor, and the residue goes to the second taker. So, if the captor himself should afterwards be taken by an enemy's cruiser, together with his ransom bill, the ransom becomes part of the lawful conquest of the enemy, and the debtors of the ransom are, consequently, discharged from the contract under the ransom bill. (*c*)

In the case of *Ricord* v. *Bettenham*, (*d*) an English vessel was captured by a French privateer, in the war of 1756, and ransomed, and a hostage given as a security for the payment of the ransom bill. The hostage died while in possession of the French, and it was made a question in the K. B., in a suit brought upon the ransom bill after the peace, whether the death of the hostage discharged the contract, and whether the alien could sue on the ransom bill in the English courts. It was shown, that such a contract was valid among the other nations of Europe, and that the owner of the bill was entitled to sue upon it, and that it was not discharged by the death of the hostage, who was taken
*107 as a mere collateral *security, and the plaintiff was, ac-

(*d*) Pothier, Traité du Droit de Propriété, Nos. 134, 135.
(*a*) Pothier, Traité de Propriété, No. 138.
(*b*) Ord. des Prises, art. 19.
(*c*) Pothier, Ibid. Nos. 139, 140.
(*d*) 3 Burr. 1734.

cordingly, allowed to recover. But it has been since decided, and it is now understood to be the law, that, during war, and while the character of alien enemy continues, no suit will lie in the British courts by the enemy, in proper person, on a ransom bill, notwithstanding it is a contract arising *jure belli*. (*a*) The remedy to enforce payment of the ransom bill, for the benefit of the enemy captor, is by an action by the imprisoned hostage, in the courts of his own country, for the recovery of his freedom. This severe technical objection would seem to be peculiar to the British courts, for it was shown, in the case of *Ricord* v. *Bettenham*, to be the practice in France and Holland to sustain such actions by the owner of the ransomed contract. Lord Mansfield considered the contract as worthy to be sustained by sound morality and good policy, and as governed by the law of nations and the eternal rules of justice. (*b*) The practice in France, (*c*) when a French vessel has been ransomed, and a hostage given to the enemy, is for the officers of the admiralty to seize the vessel and her cargo, on her return to port, in order to compel the owners to pay the ransom debt, and relieve the hostage: and this is a course dictated by a prompt and liberal sense of justice.

The recapture of the ransom bill, according to Valin, (*d*) puts an end to the claim of the captor. He may be deprived of the entire benefit of his prize, as well as of the ransom bill, either by recapture or rescue, and the questions arising on them lead to the consideration of postliminy and salvage. Upon recapture from pirates, the property is to be restored to the owner, on the allowance of a reasonable compensation to the retaker, in the nature of salvage; for it * is a principle of the law of na- * 108
tions, that a capture by pirates does not, like a capture by an enemy in solemn war, change the title, or devest the original owner of his right to the property, and it does not require the doctrine of postliminy to restore it. (*a*) In France, property may be reclaimed by the owner within a year and a day; (*b*) but in some other countries (and Grotius mentions Spain and Venice) the rule

(*a*) Anthon *v.* Fisher, Doug. 649, note; The Hoop, 1 Rob. Adm. 196.
(*b*) Cornu *v.* Blackburne, Doug. 641.
(*c*) Pothier, Traité de Propriété, No. 144.
(*d*) Tom. ii. liv. 3, tit. 9, art. 19.
(*a*) Grotius, b. 3, c. 9, sec. 16, 17; Bynk. Q. J. Pub. b. 1, c. 15 and 17.
(*b*) Valin's Comm. tom. ii. 261.

formerly was, that the whole property recaptured from pirates went to the retaker, and this rule was founded on the consideration of the desperate nature of the recovery.

Jus Postliminii.

The *jus postliminii* was a fiction of the Roman law, by which persons or things taken by the enemy were restored to their former state upon coming again under the power of the nation to which they formerly belonged. *Postliminium fingit eum qui captus est, in civitate semper fuisse.* (*c*) It is a right recognized by the law of nations, and contributes essentially to mitigate the calamities of war. When, therefore, property taken by the enemy is either recaptured or rescued from him, by the fellow-subjects or allies of the original owner, it does not become the property of the recaptor or rescuer, as if it had been a new prize, but it is restored to the original owner, by right of postliminy, upon certain terms. Movables are not entitled, by the strict rules of the law of nations, to the full benefit of postliminy, unless retaken from the enemy promptly after the capture, for then the original owner neither finds a difficulty in recognizing his effects, nor is presumed to have relinquished them. Real property is easily identified, and therefore more completely within the right of postliminy; and the reason for a stricter limitation of it in respect to personal property arises from its transitory nature, and the difficulty of identifying it, and the consequent presumption that the original owner had abandoned the hope of re-
*109 covery. (*d*) *This right does not take effect in neutral countries, because the neutral nation is bound to consider the war on each side as equally just, so far as relates to its effects, and to look upon every acquisition made by either party as a lawful acquisition; with the exception of cases where the capture itself is an infringement of the jurisdiction or rights of the neutral power. (*a*) If one party was allowed, in a neutral territory, to enjoy the right of claiming goods taken by the other, it would be a departure from the duty of neutrality. The right of postliminy takes place, therefore, only within the territories of the nation of the captors, or of its ally; (*b*) and if a prize be brought into a

(*c*) Inst. 1, 12, 5.

(*d*) Vattel, b. 3, c. 14, sec. 209.

(*a*) M'Donough *v.* Dannery, 3 Dallas, 188, 198; The Josefa Segunda, 5 Wheaton, 338, 358. See also, *post*, p. 121.

(*b*) Vattel, b. 3, c. 14, sec. 207, 208.

neutral port by the captors, it does not return to the former owner by the law of postliminy, because neutrals are bound to take notice of the military right which possession gives, and which is the only evidence of right acquired by military force, as contradistinguished from civil rights and titles. They are bound to take the fact for the law. Strictly speaking, there is no such thing as a marine tort between belligerents. All captures are to be deemed lawful, and they have never been held within the cognizance of the prize tribunals of neutral nations. (*c*) With respect to persons, the right of postliminy takes place even in a neutral country; so that if a captor brings his prisoners into a neutral port, he may, perhaps, confine them on board his ship, as being, by fiction of law, part of the territory of his sovereign, but he has no control over them on shore. (*d*)

* In respect to real property, the acquisition by the conqueror is not fully consummated until confirmed by the treaty of peace, or by the entire submission or destruction of the state to which it belonged. (*a*) If it be recovered by the original sovereign, it returns to the former proprietor, notwithstanding it may, in the mean time, have been transferred by purchase. The purchaser is understood to have taken the property at the hazard of a recovery or reconquest before the end of the war. But if the real property, as a town or portion of the territory, for instance, be ceded to the conqueror by the treaty of peace, the right of postliminy is gone forever, and a previous alienation by the conqueror would be valid. (*b*) *110

In a land war, movable property, after it has been in complete possession of the enemy for twenty-four hours, (and which goes by the name of booty and not prize,) becomes absolutely his, without any right of postliminy in favor of the original owner; and much more ought this species of property to be protected from the operation of the rule of postliminy, when it has not only passed into

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(*c*) L'Amistad de Rues, 5 Wheaton, 390.

(*d*) Vattel, b. 3, c. 7, sec. 132; Bynk. by Duponceau, pp. 116, 117, notes; Austrian Ord. of Neutrality, August 7th, 1803, art. 19. By one of the provisions of a commercial treaty between Carthage and Rome, in the earliest period of the Roman republic, soon after the expulsion of Tarquin, it was stipulated, that if either party should bring into the ports of the other prisoners taken from an ally, the prisoners might be reclaimed and set free. Polybius, b. 3, c. 3.

(*a*) Puff. Droit de la Nature par Barbeyrac, liv. 8, c. 6, sec. 20.

(*b*) Vattel, b. 3, c. 14, sec. 212; Martens, b. 8, c. 3, sec. 11, 12.

the complete possession of the enemy, but been *bonâ fide* transferred to a neutral. By the ancient and strict doctrine of the law of nations, captures at sea fell under the same rule as other movable property taken on land; and goods so taken were not recoverable by the original owner from the rescuer or retaker. But the municipal regulations of most states have softened the rigor of the law of nations on this point, by an equitable extension of the right of postliminy, as against a recaption by their own subjects. The ordinances of several of the continental powers confined the right of restoration, on recaption, to cases where the prop-
*111 erty *had not been in possession of the enemy above twenty-four hours. This was the rule of the French ordinance of 1681; (*a*) but now the right is everywhere understood to continue until sentence of condemnation, and no longer.

It is also a rule on this subject, that if a treaty of peace makes no particular provisions relative to captured property, it remains in the same condition in which the treaty finds it, and it is tacitly conceded to the possessor. The right of postliminy no longer exists, after the conclusion of the peace. It is a right which belongs exclusively to a state of war, (*b*) and therefore a transfer to a neutral, before the peace, even without a judicial sentence of condemnation, is valid, if there has been no recovery or recaption before the peace. The intervention of peace cures all defects of title, and vests a lawful possession in the neutral, equally as the title of the enemy captor himself is quieted by the intervention of peace. (*c*) The title, in the hands of such a neutral, could not be defeated in favor of the original owner, even by his subsequently becoming an enemy. It would only be liable, with his other property, to be seized as prize of war. (*d*)

Every power is obliged to conform to these rules of the law of nations relative to postliminy, where the interests of neutrals are concerned. But in cases arising between its own subjects, or between them and those of her allies, the principle may undergo such modifications as policy dictates. Thus, by several English statutes, the maritime right of postliminy, as among English subjects, subsists to the end of the war; and, therefore, ships or goods

(*a*) Liv. 3, tit. 9. Des Prises, art. 8.
(*b*) Vattel, b. 3, c. 14, sec. 216.
(*c*) Schooner Sophie, 6 Rob. Adm. 138.
(*d*) The Purissima Conception, 6 Rob. Adm. 45.

captured at sea by an enemy, and retaken at any period during the war, and whether before or after sentence of condemnation, are to be restored to the original proprietor, on securing to the recaptors certain rates of salvage, as a compensation or reward * for the service they have performed. (*a*) The * 112 maritime law of England gives the benefit of this liberal rule of restitution, with respect to the recaptured property of her own subjects, to her allies, unless it appears that they act on a less liberal principle, and then it treats them according to their own measure of justice. (*b*) Great Britain seems to have no fixed rule as to the quantum of salvage on a foreign vessel in cases of recapture, and the rate of salvage in other nations of Europe is different, as allowed by different nations. (*c*) The allotment of salvage, on recapture or rescue, is a question not of municipal law merely, except as to the particular rates of it. It is a question of the *jus gentium*, when the subjects of allies or neutral states claim the benefit of the reception. The restitution is a matter not of strict right, after the property has been vested in the enemy, but one of favor and relaxation; and the belligerent recaptor has a right to annex a reasonable condition to his liberality. (*d*) Neutral property, retaken from the enemy, is usually restored, without the payment of any salvage, unless from the nature of the case, or the usages of the enemy, there is a probability that the property would have been condemned, if carried into the enemy's ports, and in that case a reasonable salvage ought to be allowed, for a benefit has been conferred. (*e*) [1]

The United States, by the act of Congress of 3d March, 1800, directed restoration of captured property, at sea, to the foreign and friendly owner, on the payment of reasonable salvage; but the act was not to apply when the property had been condemned

(*a*) 1 Chitty on Commercial Law, 435.

(*b*) The Santa Cruz, 1 Rob. Adm. 49.

(*c*) Wheaton on Captures, 245, 246, 297; Opinions of the Attorneys-General, vol. i. 435.

(*d*) The Two Friends, 1 Rob. Adm. 271; Marshall on Ins. 474; Doug. 648.

(*e*) The War Onskan, 2 Rob. Adm. 299; The Carlotta, 5 Rob. Adm. 54.

[1] Though private property may be taken by a military commander for public use, or to prevent its falling into the hands of the enemy, yet the danger must be imminent, and the necessity admitting of no delay. Mitchell *v.* Harmony, 1 Blatch. C. C. 549; S. C. 13 How. U. S. 115.

as prize by a competent court, before recapture; nor when the foreign government would not restore the goods or vessels of the citizens of the United States, under the like circumstances.

*113 The statute continued * the *jus postliminii*, until the property was devested by a sentence of condemnation, and no longer; and this was the rule adopted in the English courts, before the extension of the right of postliminy, by statutes, in the reigns of Geo. II. and Geo. III. (*a*)

(*a*) Lord Mansfield, 2 Burr. 693, 1209; L'Actif, 1 Edw. Adm. 186.

LECTURE VI.

OF THE GENERAL RIGHTS AND DUTIES OF NEUTRAL NATIONS.

THE rights and duties which belong to a state of neutrality form a very interesting title in the code of international law. They ought to be objects of particular study in this country, inasmuch as it is our true policy to cherish a spirit of peace, and to keep ourselves free from those political connections which would tend to draw us into the vortex of European contests. A nation that maintains a firm and scrupulously impartial neutrality, and commands the respect of all other nations by its prudence, justice, and good faith, has the best chance to preserve unimpaired the blessings of its commerce, the freedom of its institutions, and the prosperity of its resources. Belligerent nations are interested in the support of the just rights of neutrals, for the intercourse which is kept up by means of their commerce contributes greatly to mitigate the evils of war. The public law of Europe has established the principle, that, in time of war, countries not parties to the war, nor interposing in it, shall not be materially affected by its action; but they shall be permitted to carry on their accustomed trade, under the few necessary restrictions which we shall hereafter consider.

Neutrals must be impartial.

It belongs not to a common friend to judge between the belligerent parties, or to determine the question of right between them. (a) The neutral is not to favor one of them * to the detriment of the other; and it is an essential character of neutrality, to furnish no aids to one party which the neutral is not equally ready to furnish to the other. (a) A nation which would be admitted to the privileges of neutrality, * 116

(a) Bynk. b. 1, c. 9; Burlamaqui, vol. ii. part 4, c. 5, sec. 16, 17.

(a) Mr. Manning, after referring to the practice of former times on the subject of foreign levies in neutral countries, and critically examining the reasoning of Vattel, justly concludes that foreign levies may not be allowed to one belligerent, while refused to his antagonist, consistently with the duties of neutrality, unless such an exclusive privilege was granted by treaty antecedent to the war. Manning's Commentaries, p. 180.

must perform the duties it enjoins. Even a loan of money to one of the belligerent parties is considered to be a violation of neutrality. (*b*) A fraudulent neutrality is no neutrality. But the neutral duty does not extend so far as to prohibit the fulfilment of antecedent engagements, which may be kept consistently with an exact neutrality, unless they go so far as to require the neutral nation to become an associate in the war. (*c*) If a nation be under a previous stipulation made in time of peace, to furnish a given number of ships or troops to one of the parties at war, the contract may be complied with, and the state of peace preserved, except so far as the auxiliary forces are concerned. The cantons of Switzerland have been accustomed to furnish such assistance to the other European powers. In 1788, Denmark furnished ships and troops to Russia, in her war with Sweden, in consequence of a previous treaty prescribing the amount; and this was declared by Denmark to be an act consistent with a spirit of amity and commercial intercourse with Sweden. It was answered by the latter in her counter declaration, that though she could not reconcile the practice with the law of nations, yet she embraced the Danish declaration, and confined her hostility, so far as Denmark was concerned, to the Danish auxiliaries furnished to Russia. (*d*) But, if a neutral power be under contract to furnish succors to one party, he is said not to be bound if his ally was the
*117 aggressor; and in this solitary instance the *neutral may examine into the merits of the war, so far as to see whether the *casus fœderis* exists. (*a*) An inquiry of this kind, instituted

(*b*) Mr. Pickering's Letter to Messrs. Pinckney, Marshall, and Gerry, 2d of March, 1798. In Dewutz *v.* Hendricks, 9 Moore C. B. 586; S. C. 2 Bing. 314, it was held to be contrary to the law of nations for persons residing in England to enter into engagements to raise money, by way of loan, for the purpose of supporting subjects of a foreign state in arms against a government in friendship with England, and no right of action attached upon any such contract.[1]

(*c*) Vattel, b. 3, c. 6, sec. 99, 100, 101; Ib. c. 7, sec. 104, 105; Martens's Summary, b. 8, c. 5, sec. 9; Mr. Jefferson's Letter to Mr. Pinckney, September 7th, 1793.

(*d*) New Ann. Reg. for 1788, tit. Public Papers, p. 99.

(*a*) Bynk. Q. J. Pub. b. 1, c. 9; Vattel, b. 2, c. 12, sec. 168.

[1] The Court of Chancery at the suit of a friendly foreign sovereign will restrain the manufacture in England of paper money to be used in aid of rebellion and hostility to such sovereign. Such manufacture is an offence against the law of nations. Emperor of Austria *v.* Kossuth, 2 Giff. 628. See also Thomson *v.* Powles, 2 Sim. 194; Taylor *v.* Barclay, Ibid. 213; and Jones *v.* Garcia del Rio, Turn. & Russ. 298.

by the party to the contract, for the purpose of determining on its binding obligation, holds out strong temptations to abuse; and, in the language of Mr. Jenkinson, (*b*) "when the execution of guaranties depends on questions like these, it will never be difficult for an ally who hath a mind to break his engagements, to find an evasion to escape."

Neutral territory inviolable.

A neutral has a right to pursue his ordinary commerce, and he may become the carrier of the enemy's goods, without being subject to any confiscation of the ship, or of the neutral articles on board; though not without the risk of having the voyage interrupted by the seizure of the hostile property. As the neutral has a right to carry the property of enemies in his own vessel, so, on the other hand, his own property is inviolable, though it be found in the vessels of enemies. But the general inviolability of the neutral character goes further than merely the protection of neutral property. It protects the property of the belligerents when within the neutral jurisdiction. It is not lawful to make neutral territory the scene of hostility, or to attack an enemy while within it; and if the enemy be attacked, or any capture made, under neutral protection, the neutral is bound to redress the injury, and effect restitution. (*c*)[1] The books are

(*b*) Discourse on the Conduct of the Government of Great Britain in respect to Neutral Nations, 1757.

(*c*) Grotius, b. 3, c. 4, sec. 8, note 2; Bynk. b. 1, c. 8; Vattel, b. 3, c. 7, sec. 132; Burlamaqui, vol. ii. part 4, c. 5, sec. 19.

[1] The doctrine in the text was the subject of great discussion in a case of national interest.

The governments of the United States and of Portugal, by a convention of February 26th, 1851, submitted their differences, relative to "The General Armstrong," privateer, destroyed by an English squadron, in the Port of Fayal, September 27th, 1814, to the decision of the President of the French Republic. The decision of Louis Napoleon, given November 30th, 1852, was in favor of Portugal, suggesting the following grounds:

That the English boats, approaching the privateer, in the night preceding the action, were ordered off, and fired upon by the American crew:

That the feebleness of the Portuguese garrison rendered an armed intervention impossible, and the governor endeavored, by remonstrance, to preserve the peace of his port:

And the commander of the privateer, not having, from the beginning, had recourse to the intervention of the neutral power, and having employed arms to repel the attack, and thus disregarded the neutrality of the port, the neutral sovereign was released from the obligation to assure him protection by any other mode than pacific intervention.

full of cases recognizing this principle of neutrality. In the year 1793, the British ship Grange was captured in Delaware Bay by a French frigate, and upon due complaint, the American government caused the British ship to be promptly restored. (*d*)

*118 So in the case of *The Anna*, (*e*) the *sanctity of neutral territory was fully asserted and vindicated, and restoration made of property captured by a British cruiser near the mouth of the Mississippi, and within the jurisdiction of the United States. It is a violation of neutral territory for a belligerent ship to take her station within it, in order to carry on hostile expeditions from thence, or to send her boats to capture vessels being beyond it. No use of neutral territory, for the purposes of war, can be permitted. This is the doctrine of the government of the United States. (*a*) It was declared judicially in England, in the case of *The Twee Gebroeders;* (*b*) and though it was not understood that the prohibition extended to remote objects and uses, such as procuring provisions and other innocent articles, which the law of nations tolerated, yet it was explicitly declared, that no proximate acts of war were in any manner to be allowed to originate on neutral ground: and for a ship to station herself within the neutral line, and send out her boats on hostile enterprises, was an act of hostility much too immediate to be permitted. No act of hostility is to be commenced on neutral ground. No measure is to be taken that will lead to immediate violence. The neutral is to carry himself with perfect equality between both belligerents, giving neither the one nor the other any advantage; and if the respect due to neutral territory be violated by one party,

*119 without being promptly punished by *just animadversion, it would soon provoke a similar treatment from the other party, and the neutral ground would become the theatre of war. (*a*)[1]

(*d*) Mr. Jefferson's Letter to Mr. Ternant, of 15th May, 1793.

(*e*) 5 Rob. Adm. 373.

(*a*) Mr. Randolph's Circular to the Governors of the several States, April 16th, 1795. The American commissioners to the court of France, (Benjamin Franklin, Silas Deane, and Arthur Lee,) in their circular letter in 1777, to the commanders of American armed vessels, carried very far the extension of neutral protection, when they applied it indiscriminately to all captures "within sight of a neutral coast." Diplomatic Correspondence, by J. Sparks, vol. ii. 110. *Vide supra*, Lecture II.

(*b*) 3 Rob. Adm. 162.

(*a*) When Don Miguel, 1828, ascended the throne of Portugal, by a vote of the Por-

[1] By a treaty, ratified July 4, 1850, between the United States and Great Britain,

If a belligerent cruiser inoffensively passes over a portion of water lying within neutral jurisdiction, that fact is not usually considered such a violation of the territory as to affect and invalidate an ulterior capture made beyond it. The passage of ships over territorial portions of the sea, is a thing less guarded than the passage of armies on land, because less inconvenient, and permission to pass over them is not usually required or asked. To vitiate a subsequent capture, the passage must at least have been expressly refused, or the permission to pass obtained under false pretences. (*b*)

The right of a refusal of a pass over neutral territory to the troops of a belligerent power, depends more upon the inconvenience falling on the neutral state, than on any injustice committed to the third party, who is to be affected by the permission or refusal. It is no ground of complaint against the intermediate neutral state, if it grants a passage to belligerent troops, though inconvenience may thereby ensue to the adverse belligerent. It is a matter resting in the sound discretion of the neutral power, who may grant or withhold the permission, without any breach of neutrality. (*c*) No belligerent power can claim the right of passage through a neutral territory, unless founded upon a previous treaty, and it cannot be granted by a neutral, where there is no antecedent treaty, unless an equality of privilege be allowed to both belligerents. This is the reasonable and just rule to be deduced from the opinions of jurists and the conventional law of modern nations. (*d*)

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tuguese Cortes, in violation of the title by succession of his niece, Donna Maria, England declared herself neutral as between those claimants, in their domestic quarrel for the crown. Having declared her neutrality, England maintained it with fidelity and vigor. She would not allow any warlike equipments by either party in her ports; and when an armament had been fitted out in disguise, and sailed from Plymouth, in support of the claims of Donna Maria, England sent a naval force, and actually intercepted the Portuguese armament in its destination to the island Terceira.

(*b*) The Twee Gebroeders, 3 Rob. Adm. 336.

(*c*) Grotius, b. 2, c. 2, sec. 13, n. 4; Vattel, b. 3, c. 7, sec. 119, 123, 127; Sir William Scott, 3 Rob. Adm. 353.

(*d*) Grotius, b. 3, c. 7, sec. 2, 3; Vattel, b. 3, c. 7, sec. 126; Manning's Commentaries, 182 – 186. Within a few years after the expulsion of the Tarquins, the Romans, under

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these powers engaged that neither would obtain exclusive control over a ship-canal which might be made between the Atlantic and Pacific oceans, by way of the river San Juan de Nicaragua, and guaranteed the neutrality of the canal.

*120 * Bynkershoek (*a*) makes one exception to the general inviolability of neutral territory, and supposes that if an enemy be attacked on hostile ground, or in the open sea, and flee within the jurisdiction of a neutral state, the victor may pursue him *dum fervet opus*, and seize his prize within the neutral state. He rests his opinion entirely on the authority and practice of the Dutch, and admits that he had never seen the distinction taken by the publicists, or in the practice of nations. It appears, however, that Casaregis, and several other foreign jurists mentioned by Azuni, (*b*) held a similar doctrine. But D'Abreu, Valin, Emerigon, Vattel, Azuni, and others maintained the sounder doctrine, that when the flying enemy has entered neutral territory, he is placed immediately under the protection of the neutral power. The same broad principle that would tolerate a forcible entrance upon neutral ground or waters, in pursuit of the foe, would lead the pursuer into the heart of a commercial port. There is no exception to the rule that every voluntary entrance into neutral territory, with hostile purposes, is absolutely unlawful. (*c*) The neutral border must not be used as a shelter for making preparations to renew the attack; and though the neutral is not obliged to refuse a passage and safety to the pursuing party, he ought to cause him to depart as soon as possible, and not permit him to lie by and watch his opportunity for further contest. This would be making the neutral country directly auxiliary to the war, and to the comfort and support of one party. In the case of *The Anna*, (*d*) Sir William Scott was inclined to agree with Bynkershoek to this extent; that if a vessel refused to submit to visitation and search, and fled within neutral territory, to places

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the auspices of the consul, Spurius Cassius, concluded a league with the thirty cities or states of Latium; and one article was, that neither party should give to the other's enemies a passage through their lands. Dionysius, b. 6, sec. 95; Niebuhr's History of Rome, vol. ii. 28.

(*a*) Q. J. Pub. b. 1, c. 8.

(*b*) Maritime Law, vol. ii. 223, edit. N. Y.

(*c*) Vattel, b. 3, c. 7, sec. 133; 1 Emerigon, Traité des Ass. 449; Azuni, vol. ii. 223. It was observed by the American Secretary of State, (Mr. Webster,) in the diplomatic correspondence between him and the British minister, (Lord Ashburton,) relative to the case of the steamboat Caroline, on the Canadian border, and seemingly admitted by Lord Ashburton, that, to justify a hostile entrance upon neutral territory, there must exist a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation.

(*d*) 5 Rob. Adm. 385, *d*.

which were uninhabited, like the little mud islands before the *mouth of the Mississippi, and the cruiser, without *121 injury or annoyance to any person, should quietly take possession of his prey, he would not stretch the point so far, on that account only, as to hold the capture illegal. But in this, as well as in every other case of the like kind, there is, *in stricto jure*, a violation of neutral jurisdiction, and the neutral power would have a right to insist on a restoration of the property. It was observed by the same high authority, in another case, depending on a claim of territory, (*a*) "that when the fact is established, it overrules every other consideration. The capture is done away; the property must be restored, notwithstanding it may actually belong to the enemy."

A neutral has no right to inquire into the validity of a capture, except in cases in which the rights of neutral jurisdiction were violated; and, in such cases, the neutral power will restore the property, if found in the hands of the offender, and within its jurisdiction, regardless of any sentence of condemnation by a court of a belligerent captor. (*b*) It belongs solely to the neutral government to raise the objection to a capture and title, founded on the violation of neutral rights. The adverse belligerent has no right to complain when the prize is duly libelled before a competent court. (*c*) If any complaint is to be made on the part of the captured, it must be by his government to the neutral government, for a fraudulent, or unworthy, or unnecessary submission to a violation of its territory, and such submission will naturally provoke retaliation. In the case of prizes brought within a neutral port, the neutral sovereign exercises jurisdiction so far as to restore the property of its *own subjects, illegally captured; and this is done, says *122 Valin, (*a*) by way of compensation for the asylum granted to the captor and his prize. It has been held, in this country, that foreign ships, offending against our laws, within our jurisdiction, may be pursued and seized upon the ocean, and rightfully brought into our ports for adjudication. (*b*)

Prizes brought into neutral ports.

(*a*) The Vrow Anna Catharina, 5 Rob. Adm. 15.

(*b*) The Arrogante Barcelones, 7 Wheaton, 496; The Austrian Ordinance of Neutrality, August 7th, 1808, art. 18; L'Amistad de Rues, 5 Wheaton, 390.

(*c*) Case of The Etrusco, 3 Rob. Adm. 162, note.

(*a*) Com. tom. ii. 274.

(*b*) The Marianna Flora, 11 Wheaton, 42.

The government of the United States was warranted by the law and practice of nations, in the declarations made in 1793, of the rules of neutrality, which were particularly recognized as necessary to be observed by the belligerent powers, in their intercourse with this country. (*c*) These rules were, that the original arming or equipping of vessels in our ports, by any of the powers at war, for military service, was unlawful; and no such vessel was entitled to an asylum in our ports. The equipment by them of government vessels of war, in matters which, if done to other vessels, would be applicable equally to commerce or war, was lawful. The equipment by them of vessels fitted for merchandise and war, and applicable to either, was lawful: but if it were of a nature solely applicable to war, it was unlawful. And if the armed vessel of one nation should depart from our jurisdiction, no armed vessel, being within the same, and belonging to an adverse belligerent power, should depart until twenty-four hours after the former, without being deemed to have violated the law of nations. (*d*) Congress have repeatedly, by statute, made suitable provision for the support and due observance of similar rules of neutrality, and given sanction to the prin-
* 123 ciple of them, as being * founded in the universal law of nations. It is declared to be a misdemeanor for any citizen of the United States, within the territory or jurisdiction thereof, to accept and exercise a commission to serve a foreign prince, state, colony, district or people, in war, by land or by sea, against any prince, state, colony, district, or people, with whom the United States are at peace; or for any person, except a subject or citizen of any foreign prince, state, colony, district, or people, transiently within the United States, on board of any foreign armed vessel, within the territory or jurisdiction of the United States, to enlist or enter himself, or hire or retain another person to enlist or enter himself, or to go beyond the limits or jurisdiction of the United States, with intent to be enlisted or entered in the service of any foreign

Arming in neutral ports.

(*c*) Vattel, b. 3, sec. 104; Wolfius, sec. 1174; Austrian Ordinance of Neutrality, August 7th, 1803; Cours de Droit Public, par M. Pinheiro-Ferreira, tom. ii. pp. 44–47.

(*d*) Instructions to the Collectors of the Customs, August 4th, 1793. Mr. Jefferson's Letters to M. Genet, of 5th and 17th June, 1793; His Letter to Mr. Morris, of 16th August, 1793; Mr. Pickering's Letter to Mr. Pinckney, January 16th, 1797; his Letter to M. Adet, January 20th, 1796.

prince, state, colony, district, or people, as a soldier, or mariner, or seaman;[1] or to fit out and arm, or to increase or augment the force of any armed vessel, with intent that such vessel be employed in the service of any foreign power at war with another power with whom we are at peace; or to begin, or set on foot, or provide, or prepare the means for any military expedition or enterprise, to be carried on *from thence* against the territory or dominions of any foreign prince or state, or of any colony, district, or people with whom we are at peace; or to hire or enlist troops or seamen for foreign military or naval service; or to be concerned in fitting out any vessel to cruise or commit hostilities in foreign service against a nation at peace with us; and the vessel, in this latter case, is made subject to forfeiture. The President of the United States is also authorized to employ force to compel any foreign vessel to depart, which, by the law of nations, or by treaty, ought not to remain within the United States, and to employ the public force generally in enforcing the observance of the duties of neutrality prescribed by law. (*a*) In the case of *The Santissima Trinidad*, (*b*) it was decided, that captures made by a vessel so illegally fitted out, whether a public or private armed ship, were torts, and that the original owner was entitled to restitution, if the property was brought within our jurisdiction; but that an illegal outfit did not affect a capture made after a cruise, to which the outfit had been applied, had terminated. The offence was deposited with the voyage, and the *delictum* ended with the termination of the cruise. (*c*)

(*a*) Acts of Congress of 5th June, 1794, and 20th April, 1818, c. 83.[2] By an act of Congress of March 10th, 1838, c. 31, the provisions of the act of 1818 were enlarged and applied to any military expedition or enterprise against the territory of any foreign prince or state, or of any colony, district, or people, conterminous with the United States, and with whom they are at peace.[3] Great Britain by act of Parliament of 59 Geo. III., called the Foreign Enlistment Act, in like manner prohibited enlistments and equipments within the king's dominions, for warlike purposes in foreign states.

(*b*) 7 Wheaton, 283.

(*c*) The seamen of a neutral nation may serve on board of a *commercial* vessel of a belligerent power, or be employed in a contraband trade on board of a neutral vessel,

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[1] U. S. *v.* Kazinski, 18 Law Rep. 254.

[2] See an official opinion upon foreign enlistments in the United States, by the late Attorney-General. Opinions of Atty's-Gen. vol. vii. p. 367.

[3] The act of 1838 expired by limitation at the end of two years.

Though a belligerent vessel may not enter within neutral jurisdiction for hostile purposes, she may, consistently with a state of neutrality, until prohibited by the neutral power, * 124 bring her prize into a neutral port, * and sell it. (*a*) The neutral power is, however, at liberty to refuse this privilege, provided the refusal be made to both parties, as the privilege ought to be granted to both parties, or to neither. The United States, while a neutral power, frequently asserted the right to prohibit, at discretion, the sale within their ports of prizes brought in by the belligerents; and the sale of French prizes was allowed as an indulgence merely, until it interfered with the treaty of England of 1794, in respect to prizes made by privateers. (*b*) In the opinion of some jurists, it is more consistent with a state of neutrality, and the dictates of true policy, to refuse this favor; for it must be very inconvenient to permit the privateers of contending nations to assemble, together with their prizes, in a neutral port. The edict of the States General of 1656 forbade foreign cruisers to sell their prizes in their neutral ports, or cause them to be unladen; and the French ordinance of the marine of 1681 contained the same prohibition, and that such vessels should not continue in port longer than twenty-four hours, unless detained by stress of weather. (*c*) The admission into neutral ports of the public ships of the belligerent parties, without prizes, and under due regulations, is considered to be a favor, required on the principle of hospitality among friendly powers, and it has been uniformly conceded on the part of the United States. (*d*)

Prizes in neutral ports.

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without being liable to punishment personally, by the municipal laws of his own country, or by the law of nations. Opinions of the Attorneys-General of the United States, vol. i. 35.

(*a*) Bynk. b. 1, c. 15; Vattel, b. 3, c. 7, sec. 132; Martens, b. 8, c. 6, sec. 6; Hopner *v.* Appleby, 5 Mason, 77.

(*b*) Instructions to the American Ministers to France, July 15th, 1797. Mr. Pickering's Letters to M. Adet, May 24th, and November 15th, 1796. His letter to Mr. Pinckney, January 16th, 1797. It is deemed proper and safe for a neutral power to permit a prize brought into port in distress, *to be repaired*, for the purpose of further navigation. Opinions of the Attorneys-General, vol. i. 603.

(*c*) Valin's Com. tom. ii. 272.

(*d*) Mr. Jefferson's letter to Mr. Hammond, September 9th, 1793. Instructions to the American Commissioners to France, July 15th, 1797. Cours de Droit Public, par M. Pinheiro-Ferreira, tom. ii. p. 47. Such public vessels are exempt from the jurisdiction of the local authorities; but this exemption does not extend to private vessels. *Vide infra*, p. 156, note.

But neutral ships do not afford protection to enemy's property, and it may be seized if found on board of a neutral vessel, beyond the limits of the neutral jurisdiction. This is a clear and well-settled principle of the law of nations. (*e*) It was formerly a question, whether the neutral ship, conveying enemy's property, was not liable to confiscation for that cause. This was the old law of France, (*a*) in cases in which the master of the vessel knowingly took on board enemy's property; but Bynkershoek truly observes, that the master's knowledge is immaterial in this case, and that the rule in the Roman law, making the vessel liable for the fraudulent act of the master, was a mere fiscal regulation, and did not apply; and for the neutral to carry enemy's goods is not unlawful, like smuggling, and does not affect the neutral ship. (*b*) If there be nothing unfair in the conduct of the neutral master, he will even be entitled to his reasonable demurrage, and his freight for the carriage of the goods, though he has not carried them to the place of destination. They are said to be seized and condemned, not *ex delicto*, but only *ex re*. The capture of them by the enemy is a delivery to the person who, by the rights of war, was substituted for the owner. (*c*) Bynkershoek (*d*) thinks the master is not entitled to freight, because the goods were not carried to the port of destination, though he admits that the Dutch lawyers, and the *consolato*, give freight. But the allowance of freight in that case has been the uniform practice of the English admiralty for near two centuries past, except when there was some circumstance of *mala fides*, or a departure from a strictly proper neutral conduct. (*e*) The freight is paid, not *pro rata*, but *in toto*, because capture is considered as delivery, and the captor pays the whole freight, because he represents his enemy, by possessing himself of the enemy's

Enemy's property in a neutral vessel.

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(*e*) Grotius, 1, 3, c. 6, sec. 6; Heinec. de Nav. ob Vect. c. 2, sec. 9; Bynk. Q. J. Pub. c. 14; Loccenius, de Jure Mar. et Nav. b. 2, c. 4, sec. 2; Molloy, de Jure Maritimo, b. 1, c. 1, sec. 18; Lampredi, du Commerce des Neutres, sec. 10, 11; Vattel, b. 3, c. 7, sec. 115; Answer, in 1753, to the Prussian Memorial; Consulat de la Mer, par Boucher, tom ii. c. 273, 276, sec. 1004.

(*a*) Ord. de la Marine, liv. 3, tit. 9, des Prises, art. 7.

(*b*) Bynk. Q. J. Pub. lib. 1, c. 14.

(*c*) Vattel, b. 3, c. 7, sec. 115.

(*d*) B. 1, c. 14.

(*e*) Jenkinson's Discourse in 1757, p. 13; The Atlas, 3 Rob. Adm. 304, note; Answer to the Prussian Memorial, 1753.

*126 goods, **jure belli*, and he interrupts the actual delivery to the consignee. (*a*)

The right to take enemy's property on board a neutral ship has been much contested by particular nations, whose interests it strongly opposed. This was the case with Prussia in the case of the Silesia loan, and with the Dutch in the war of 1756; and Mr. Jenkinson (afterwards Earl of Liverpool) published, in 1757, a discourse, very full and satisfactory, on the ground of authority and usage, in favor of the legality of the right, when no treaty intervened to control it. The rule has been steadily maintained by Great Britain. In France it has been fluctuating. The ordinance of the marine of 1681 asserted the ancient and severe rule, that the neutral ship, having on board enemy's property, was subject to confiscation. The same rule was enforced by the arrets of 1692 and 1704, and relaxed by those of 1744 and 1778. (*b*) In 1780 the Empress of Russia proclaimed the principles of the Baltic code of neutrality, and declared she would maintain them by force of arms. One of the articles of that code was, that "all effects belonging to the subjects of belligerent powers should be looked upon as free on board of neutral ships, except only such goods as were contraband." The principal powers of Europe, as Sweden, Denmark, Prussia, Germany, Holland, France, Spain, Portugal, and Naples, and also the United States, acceded to the Russian principles of neutrality. (*c*) But the want of the consent of a power of such decided maritime superiority as that of Great Britain was an insuperable obstacle to the success of the Baltic conventional law of neutrality; and it was abandoned in 1793 by the naval powers of Europe, as not sanctioned by the existing law of nations, in every case in which the doctrines of that code

*127 *did not rest upon positive compact. During the whole course of the wars growing out of the French revolution, the government of the United States admitted the English rule to be valid, as the true and settled doctrine of international law; and that enemy's property was liable to seizure on board of neutral ships, and to be confiscated as prize of war. (*a*) It has, how-

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(*a*) The Copenhagen, 1 Rob. Adm. 289.

(*b*) Valin's Com. 1, 3, tit. 9, des Prises, art. 7.

(*c*) New Ann. Reg. for 1780, tit. Public Papers, pp. 113 – 120; Martens's Summary, 327, edit. Phil. Journals of Congress, vol. vii. pp. 68, 185.

(*a*) Mr. Jefferson's Letter to M. Genet, July 24th, 1793; Mr. Pickering's Letter to

ever, been very usual, in commercial treaties, to stipulate that free ships should make free goods, contraband of war always excepted; but such stipulations are to be considered as resting on conventional law merely, and as exceptions to the operation of the general rule, which every nation not a party to the stipulation is at perfect liberty to exact or surrender. The Ottoman Porte was the first power to abandon the ancient rule, and she stipulated, in her treaty with France, in 1604, that free ships should make free goods, and she afterwards consented to the same provision in her treaty with Holland, in 1612; and according to Azuni, (*b*) Turkey has, at all times, on international questions, given an example of moderation to the more civilized powers of Europe.

The effort made by the Baltic powers, in 1801, to recall and enforce the doctrines of the armed neutrality, in 1780, was met, and promptly overpowered, and the confederacy dissolved by the naval power of England. Russia gave up the point, and by her convention with England of the 17th June, 1801, expressly agreed, that enemy's property was not to be protected on board of neutral ships. The rule has since been very generally acquiesced in; and it was expressly recognized in the Austrian ordinance of neutrality, published at Vienna, the 7th of August, 1803. Its reasons * and authority have been ably vindicated by English * 128 statesmen and jurists, and particularly by Mr. Ward, in his treatise *of the relative rights and duties of belligerent and neutral powers in maritime affairs*, published in 1801, and which exhausted all the law and learning applicable to the question. (*a*) [1]

Mr. Pinckney, January 16th, 1797; Letter of Messrs. Pinckney, Marshall, and Gerry to the French government, January 27th, 1798.

(*b*) Maritime Law of Europe, vol. ii. 163. Flasson, in his Histoire de la Diplomatie Française, tom. ii. 226, says, that it was not the object of the Ottoman Porte, in the instance mentioned in the text, to abandon the ancient rule, and that it was not a treaty, but a concession to France of privileges and exemption, from pure liberality.

(*a*) Mr. Manning, in his Commentaries on the Law of Nations, pp. 203 – 244, has discussed the question whether "free ships make free goods," quite at large, and with great strength of reasoning. He vindicates the belligerent right against the doctrine of the Baltic powers, upon solid principles, and upon the authority of the Consolato del Mare, and of the most eminent European jurists who have written on the law of nations within the last two centuries. The principal authorities have been already re-

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[1] The following remarkable declaration of the government of Great Britain, made on the commencement of the war with Russia, in March, 1854, indicates the accession of England itself to the principles of the armed neutrality. The declaration is identical

Neutral property in an enemy's vessel.

It is also a principle of the law of nations relative to neutral rights, that the effects of neutrals, found on board of enemy's vessels, shall be free; and it is a right as fully and firmly settled as the other, though, like that, it is often changed by positive agreement. (*b*) The principle is to be met with in the Consolato del Mare, and the property of the neu-

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ferred to, at pages, 124, n. *b*, 125, n. *e*. Mr. Manning also examines the question, on the authority of the customary and conventional law of nations, by a review of a succession of treaties between European powers, from the year 1351 to the present times. The result is, that there is nothing like system or consistency of principle in the conventional law of Europe. The belligerent rule has been alternately adopted and rejected, and qualified with infinite vicissitude, and so as to leave the rule, as a general and settled principle of international law, when not disturbed by positive stipulations, in full force. Comm. pp. 244 – 280.

(*b*) Grotius, b. 3, c. 6 and 16; Bynk. c. 13; Vattel, b. 3, c. 7, sec. 116; Answer to the Prussian Memorial, 1753; Mr. Jefferson's Letter to M. Genet, July 24th, 1793; Mr. Pickering's Letter to Mr. Pinckney, January 10th, 1797.

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with that published by his Majesty the Emperor of the French. Ex. Doc. 33d Cong. 1st Sess. H. Doc. 103.

"DECLARATION. — Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, having been compelled to take up arms in support of an ally, is desirous of rendering the war as little onerous as possible to the powers with whom she remains at peace.

"To preserve the commerce of neutrals from all unnecessary obstruction, her Majesty is willing, for the present, to waive a part of the belligerent rights appertaining to her by the law of nations.

"It is impossible for her Majesty to forego the exercise of her right of seizing articles contraband of war, and of preventing neutrals from bearing the enemy's despatches, and she must maintain the right of a belligerent to prevent neutrals from breaking any effective blockade which may be established with an adequate force against the enemy's forts, harbors, or coasts.

"But her Majesty will waive the right of seizing enemy's property laden on board a neutral vessel, unless it be contraband of war.

"It is not her Majesty's intention to claim the confiscation of neutral property, not being contraband of war, found on board enemy's ships; and her Majesty further declares, that, being anxious to lessen as much as possible the evils of war, and to restrict its operations to the regularly organized forces of the country, it is not her present intention to issue letters of marque for the commissioning of privateers.

"Westminster, March 28th, 1854."

An Order in Council, passed on the 15th April, 1854, gave to the Declaration a more precise form and binding authority.

Though the belligerent claims, mentioned in the Declaration, are not renounced, but only "waived for the present," it cannot be doubted but that this measure is a great advance of the rights of neutrals and the interests of commerce. See an article on the Orders in Council on Trade during War, in the Edinburgh Review, July, 1854. It presents the latest aspect of the most important and interesting doctrines of international law.

tral is to be restored without any compensation for detention, and the other necessary inconveniences incident to the capture. The former ordinances of France, of 1543, 1585, and 1681, declared such goods to be lawful prize; and Valin (*c*) justifies the ordinances, on the ground that the neutral, by putting his property on board of an enemy's vessel, favors the enemy's commerce, and agrees to abide the fate of the vessel. But it is fully and satisfactorily shown, by the whole current of modern authority, that the neutral has a perfect right to avail himself of the vessel of his friend, to transport his property; and Bynkershoek has devoted an entire chapter to the vindication of the justice and equity of the right. (*d*)

The two distinct propositions, that enemy's goods found on board a neutral ship may lawfully be seized as prize of war, and that the goods of a neutral found on board of an
* enemy's vessel were to be restored, have been explicitly *129
incorporated into the jurisprudence of the United States, and declared by the Supreme Court (*a*) to be founded in the law of nations. The rule, as it was observed by the court, rested on the simple and intelligible principle, that war gave a full right to capture the goods of an enemy, but gave no right to capture the goods of a friend. The neutral flag constituted no protection to enemy's property, and the belligerent flag communicated no hostile character to neutral property. The character of the property depended upon the fact of ownership, and not upon the character of the vehicle in which it was found. After vindicating the simplicity and justice of the original rule of the law of nations, against the speculations of modern theorists, and the *ultima ratio* of the armed neutrality, which attempted to effect by force a revolution in the law of nations, the court stated, that nations have changed this simple and natural principle of public law, by conventions between themselves, in whole or in part, as they believed it to be for their interest; but the one proposition, that free ships should make free goods, did not necessarily imply the converse proposition, that enemy's ships should make enemy's goods. If a treaty

(*c*) Comm. b. 3, tit. 9, des Prises, art. 7.

(*d*) Consulat de la Mer, par Boucher, tom. ii. c. 276, sec. 1012, 1013; Heineccius, de Nav. ob. Vect. c. 2, sec. 9; Opera, tom. ii. part 1, pp. 349 – 355; Vattel, b. 3, c. 7, sec. 116; Bynk. c. 13.

(*a*) The Nereide, 9 Cranch, 388.

establish the one proposition, and was silent as to the other, the other stood precisely as if there had been no stipulation, and upon the ancient rule. The stipulation that neutral bottoms should make neutral goods, was a concession made by the belligerent to the neutral, and it gave to the neutral flag a capacity not given to it by the law of nations. On the other hand, the stipulation subjecting neutral property found in the vessel of an enemy to condemnation as prize of war, was a concession made by the neutral to the belligerent, and took from the neutral a privilege he possessed under the law of nations; but neither reason nor
*130 practice *render the two concessions so indissoluble, that the one could not exist without the other. It rested entirely in the discretion of the contracting parties, whether either or both should be granted. The two propositions are distinct and independent of each other, and they have frequently been kept distinct by treaties, which stipulated for the one and not for the other. (*a*)

The government of the United States, in their negotiations with the republics in South America, have pressed very earnestly for the introduction and establishment of the principle of the Baltic code of 1780, that the friendly flag should cover the cargo; and this principle was incorporated into the treaty between the United States and Colombia, in 1825, and into the treaty of navigation and commerce between the United States and the Republic of Chili, in 1832. (*b*) The introduction of those new republics into the great community of civilized nations has justly been deemed a very favorable opportunity to inculcate and establish, under their sanction, more enlarged and liberal doctrines on the subject of national rights. It has been the desire of our government to obtain the recognition of the fundamental principles, consecrated

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(*a*) The Cygnet, 2 Dod. Adm. 299, S. P.

(*b*) It was stipulated in those American treaties, that as between the parties, free ships should give freedom to goods, — that the flag should cover the cargo even of enemies, contraband goods excepted, and should also cover the persons, though enemies, unless they were officers or soldiers in actual service. But the provision was only to apply to those powers who recognized the principle; and neutral property found on board enemy's vessels was, under the above stipulation, liable to capture. If, however, the neutral flag did not protect enemy's property, then the goods of a neutral on board of an enemy's vessel were to be free. Treaty with Colombia, art. 12, 13. Treaty with Chili, art. 12, 13; Treaty with Venezuela, art. 15; Treaty with the Peru-Bolivian Confederation, art. 11, 12; Treaty with Ecuador, in 1839, art. 15.

by the treaty with Prussia, in 1785, relative to the perfect equality and reciprocity of commercial rights between nations; the abolition of private war upon the ocean; and the enlargement of the privileges of neutral commerce. The rule of public law, that the property of an enemy is liable to capture in the vessel of a friend, is now declared, on the part of our government, to have no foundation in natural right; and that the usage rests entirely on force. Though the high seas are a general jurisdiction, common to all, yet each nation has a special jurisdiction over its own vessels; and all the maritime nations of modern Europe have, at times, acceded to the principle, that the property of an enemy should be protected in the vessel of a friend. No neutral nation, it is said, is bound to submit to the usage; and the neutral may have * yielded at one time to the usage, without sacrificing the * 131 right to vindicate, by force, the security of the neutral flag at another. The neutral right to cover enemy's property is conceded to be subject to this qualification; that a belligerent nation may justly refuse to neutrals the benefit of this principle, unless it be conceded also by the enemy of the belligerent to the same neutral flag. (*a*)[1]

But, whatever may be the utility or reasonableness of the neutral claim, under such a qualification, I should apprehend the belligerent right to be no longer an open question; and that the authority and usage on which that right rests in Europe, and the long, explicit, and authoritative admission of it by this country, have concluded us from making it a subject of controversy; and that we are bound, in truth and justice, to submit to its regular exercise, in every case, and with every belligerent power who does not freely renounce it.

It has been a matter of discussion, whether the captor of the

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(*a*) Letter of Mr. Adams, Secretary of State, to Mr. Anderson, 27th May, 1823. President's Message to the Senate, of 26th December, 1825, and to the House of Representatives, March 15th, 1826.

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[1] See the convention concluded between the United States and the Two Sicilies, Jan. 13, 1855. The two high contracting parties agree that free ships shall make free goods, except contraband; and that neutral property in enemy's vessels shall be free, with the same exception; and they engage to apply these principles to the navigation and commerce of all such states as shall consent to adopt them as permanent and immutable. There are the same provisions in the convention between the United States and Peru, made July 22d, 1856.

enemy's vessel be entitled to freight from the owner of the neutral goods found on board, and restored. Under certain circumstances, the captor has been considered to be entitled to freight, even though the goods were carried to the claimant's own country, and restored: and he clearly is entitled to freight, if he performs the voyage, and carries the goods to the port of original destination. In no other case is freight due to the captor; and the doctrine of *pro rata* freight is entirely rejected, because it would involve a prize court in a labyrinth of minute inquiries and considerations, in the endeavor to ascertain, in every case, the balance of advantage or disadvantage which an interruption and loss of the original voyage, by capture, might have produced to the owner of the goods. (*b*)

*132 * In the case of *The Nereide*, (*a*) the Supreme Court of the United States carried the principle of immunity of neutral property on board an enemy's vessel to the extent of allowing it to be laden on board an *armed* belligerent cruiser; and it was held, that the goods did not lose their neutral character, not even in consequence of resistance made by the armed vessel, provided the neutral did not aid in such armament or resistance, notwithstanding he had chartered the whole vessel, and was on board at the time of the resistance. The act of arming was the act of the belligerent party, and the neutral goods did not contribute to the armament, further than the freight, which would be paid if the vessel was unarmed, and neither the goods nor the neutral owner were chargeable for the hostile acts of the belligerent vessel, if the neutral took no part in the resistance. A contemporary decision of an opposite character, on the same point, was made by the English high court of admiralty in the case of *The Fanny;* (*b*) and it was there observed, that a neutral subject was at liberty to put his goods on board the merchant vessel of a belligerent; but if he placed them on board an armed belligerent ship, he showed an intention to resist visitation and search, by means of the association, and, so far as he does this, he was presumed to adhere to the enemy, and to withdraw himself from his protection of neutrality. If a neutral chooses to take the protec-

(*b*) Bynk. Q. J. Pub. b. 1, c. 13; The Fortuna, 4 Rob. Adm. 278; The Diana, 5 Rob. Adm. 67; Vrow Anna Catharina, 6 Rob. Adm. 269.

(*a*) 9 Cranch, 388.

(*b*) 1 Dod. Adm. 443.

tion of a hostile force, instead of his own neutral character, he must take (it was observed) the inconvenience with the convenience, and his property would, upon just and sound principles, be liable to condemnation along with the belligerent vessel.

The question decided in the case of *The Nereide* is a very important one in prize law, and of infinite importance in its practical results; and it is to be regretted that the decisions of two courts of the highest character, on such a point, *should have been in direct contradiction to each other. *133 The same point afterwards arose, and was again argued, and the former decision repeated in the case of *The Atalanta*. (*a*) It was observed, in this latter case, that the rule with us was correct in principle, and the most liberal and honorable to the jurisprudence of this country. The question may, therefore, be considered here as at rest, and as having received the most authoritative decision that can be rendered by any judicial tribunal on this side of the Atlantic.

(*a*) 3 Wheaton, 409.

LECTURE VII.

OF RESTRICTIONS UPON NEUTRAL TRADE.

THE principal restriction which the law of nations imposes on the trade of neutrals, is the prohibition to furnish the belligerent parties with warlike stores and other articles which are directly auxiliary to warlike purposes. Such goods are denominated contraband of war; but in the attempt to define them the authorities vary, or are deficient in precision, and the subject has long been a fruitful source of dispute between neutral and belligerent nations.

Contraband of war.

In the time of Grotius, some persons contended for the rigor of war, and others for the freedom of commerce. As neutral nations are willing to seize the opportunity which war presents of becoming carriers for the belligerent powers, it is natural that they should desire to diminish the list of contraband as much as possible. Grotius distinguishes (*a*) between things which are useful only in war, as arms and ammunition, and things which serve merely for pleasure, and things which are of a mixed nature, and useful both in peace and war. He agrees with other writers in prohibiting neutrals from carrying articles of the first kind to the enemy, as well as in permitting the second kind to be carried. As to articles of the third class, which are of indiscriminate use in peace and war, as money, provisions, ships, and naval stores, he says, that they are sometimes lawful articles of neutral commerce, and sometimes not; and the question will de-
136 pend upon circumstances existing at the time. They would be contraband if carried to a besieged town, camp, or port. In a naval war, it is admitted that ships and materials for ships become contraband, and horses and saddles may be included. (*a*) Vattel speaks with some want of precision, and only says, in general terms, (*b*) that commodities, particularly used in

(*a*) B. 3, c. 1, sec. 5. See Roman Law by Lord Mackenzie, (ed. 1862,) 59, 60; Martens, Précis, t. ii. p. 316; Hautefeuille, Droits et Devoirs des Nations Neutres, t. ii. p. 337.

(*a*) Rutherforth's Inst. b. 1, c. 9.

(*b*) B. 3, c. 7, sec. 112.

war, are contraband, such as arms, military and naval stores, timber, horses, and even provisions, in certain junctures, when there are hopes of reducing the enemy by famine. Loccenius, (*c*) and some other authorities referred to by Valin, consider provisions as generally contraband; but Valin and Pothier insist that they are not so, either by the law of France or the common law of nations, unless carried to besieged or blockaded places. (*d*) The marine ordinance of Louis XIV. (*e*) included horses and their equipage, transported for military service, within the list of contraband, because they were necessary to war equipments; and that is, doubtless, the general rule. They are included in the restricted list of contraband articles mentioned in the treaty between the United States and Colombia, in 1825. Valin says, that naval stores have been regarded as contraband from the beginning of the last century, and the English prize law is very explicit on this point. Naval stores and materials for ship-building, and even corn, grain, and victuals of all sorts, going to the dominions of the enemy, were declared contraband by an ordinance of Charles I. in 1626. (*f*) Sail-cloth is now held to be universally contraband, even on a destination to ports of mere mercantile naval equipment (*g*) and in the case of *The Maria*, (*h*) it was held that *tar, *137 pitch, and hemp, and whatever other materials went to the construction and equipment of vessels of war, were contraband by the modern law of nations; though formerly, when the hostilities of Europe were less naval than at the present day, they were of a disputable nature. The executive government of this country has frequently conceded that the materials for the building, equipment, and armament of ships of war, as timber and naval stores, were contraband. (*a*) But it does not seem that ship timber is, *in se*, in all cases, to be considered a contraband article, though destined to an enemy's port. In the case of the Austrian vessel, *Il Volante*, captured by the French privateer, *L'Etoile de Bonaparte*,

(*c*) De Jure Maritimo, lib. 1, c. 4, note 9.

(*d*) Valin's Com. tom. ii. p. 264; Pothier de Propriété, No. 104.

(*e*) Des Prises, art. 11.

(*f*) Robinson's Collec. Mar. p. 63.

(*g*) The Neptunus, 3 Rob. Adm. 108.

(*h*) 1 Rob. Adm. 287, Phil. ed.

(*a*) Mr. Randolph's Letter to M. Adet, July 6th, 1795; Mr. Pickering's Letter to Mr. Pinckney, January 16th, 1797; Letter of Messrs. Pinckney, Marshall, and Gerry, to the French Minister, January 27th, 1798.

and which was carrying ship timber to Messina, an enemy's port, it was held, by the council of prizes at Paris, in 1807, upon the opinion of the advocate-general, M. Collet Descotils, that the ship timber in that case was not contraband of war, it being ship timber of an ordinary character, and not exclusively applicable to the building of ships of war. (*b*)

Questions of contraband were much discussed during the continuance of our neutral character, in the furious war between England and France, commencing in 1793, and we professed to be governed by the modern usage of nations on this point. (*c*) The national convention of France, on the 9th of May, 1793, decreed, that neutral vessels laden with provisions, destined to an enemy's port, should be arrested and carried into France; and one of the earliest acts of England, in that war, (*d*) was to detain all
*138 neutral * vessels going to France, and laden with corn, meal, or flour. It was insisted, on the part of England, (*a*) that, by the law of nations, all provisions were to be considered as contraband, in the case where the depriving of an enemy of those supplies was one of the means employed to reduce him to reasonable terms of peace; and that the actual situation of France was such, as to lead to that mode of distressing her, inasmuch as she had armed almost the whole laboring class of her people, for the purpose of commencing and supporting hostilities against all the governments of Europe. This claim on the part of England was promptly and perseveringly resisted by the United States; and they contended that corn, flour, and meal, being the produce of the soil and labor of the country, were not contraband of war, unless carried to a place actually invested. (*b*) The treaty of commerce with England, in 1794, in the list of contraband, stated, that whatever materials served directly to the building and equipment of vessels, with the exception of unwrought iron and fir planks, should be considered contraband, and liable to confiscation; but the treaty left the question of provisions open and unsettled,

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(*b*) Répertoire universel et raisonné de Jurisprudence, par M. Merlin, tom. ix. tit. Prise Maritime, sec. 3, art. 3.

(*c*) President's Proclamation of Neutrality, April 22d, 1793.

(*d*) Instructions of 8th June, 1793.

(*a*) Mr. Hammond's Letter to Mr. Jefferson, September 12th, 1793, and his Letter to Mr. Randolph, April 11th, 1794.

(*b*) Mr. Jefferson's Letter to Mr. Pinckney, September 7th, 1793, and Mr. Randolph's Letter to Mr. Hammond, May 1st, 1794.

and neither power was understood to have relinquished the construction of the law of nations which it had assumed. The treaty admitted that provisions were not generally contraband, but might become so, according to the existing law of nations, in certain cases, and those cases were not defined.

It was only stipulated, by way of relaxation of the penalty of the law, that whenever provisions were contraband, the captors, or their government, should pay to the owner the full value of the articles, together with the freight, and a reasonable profit. Our government has repeatedly admitted that, as far as that treaty enumerated contraband articles, *it was declaratory of the law of nations, and that the treaty conceded nothing on the subject of contraband. (a) *139

The doctrine of the English admiralty, on the subject of provisions being considered contraband, was laid down very fully and clearly in the case of *The Jonge Margaretha*. (b) It was there observed, that the catalogue of contraband had varied much, and, sometimes, in such a manner as to make it difficult to assign the reasons of the variations, owing to particular circumstances, the history of which had not accompanied the history of the decisions. In 1673, certain articles of provision, as corn, wine, and oil, were deemed contraband, according to the judgment of a person of great knowledge and experience in the practice of the admiralty; and, in much later times, many other sorts of provisions have been condemned as contraband. In 1747 and 1748, butter and salted fish and rice were condemned as contraband; and those cases show that articles of human food have been considered as contraband, when it was probable they were intended for naval or military use. The modern established rule is, that provisions are not generally contraband, but may become so, under circumstances arising out of the particular situation of the war, or the condition of the parties engaged in it. Among the circumstances which tend to preserve provisions from being liable to be treated as contraband, one is, that they are of the growth of the country which produces them. Another circumstance, to which some indulgence is shown by the practice of nations, is when the articles are in their native and un-

(a) Mr. Pickering's Letter to Mr. Monroe, September 12th, 1795; his Letter to Mr. Pinckney, January 16th, 1797; Instructions from the Secretary of State to the American Minister to France, July 15th, 1797.

(b) 1 Rob. Adm. 159, edit. Phil.

manufactured state. Thus, iron is treated with indulgence, though anchors and other instruments fabricated out of it are directly contraband. Hemp is more favorably considered than cor-
*140 dage; *and wheat is not considered as so objectionable a commodity, when going to an enemy's country, as any of the final preparations of it for human use. The most important distinction is, whether the articles were intended for the ordinary use of life, or even for mercantile ships' use, or whether they were going with a highly probable destination to military use. The nature and quality of the port to which the articles are going is not an irrational test. If the port be a general commercial one, it is presumed the articles are going for civil use, though occasionally a ship of war may be constructed in that port. But if the great predominant character of that port, like Brest in France, or Portsmouth in England, be that of a port of naval military equipment, it will be presumed that the articles were going for military use, although it is possible that the articles might have been applied to civil consumption. As it is impossible to ascertain positively the final use of an article *ancipitis usus*, it is not an injurious rule which deduces the final use from the immediate destination; and the presumption of a hostile use, founded on its destination to a military port, is very much inflamed, if, at the time when the articles were going, a considerable armament was notoriously preparing, to which a supply of those articles would be eminently useful.

These doctrines of the English prize law were essentially the same with that adopted by the American Congress in 1775, for they declared, that all vessels, to whomsoever belonging, carrying provisions or other necessaries to the British army or navy within the colonies, should be liable to seizure and confiscation. (*a*) They were likewise fully adopted by the Supreme Court of the United States, when we came to know and feel the value of belligerent rights, by becoming a party to a maritime war. In the case of *The Commercen*, (*b*) a neutral vessel, captured by one of our cruisers in the act of carrying provisions for the use of the British armies in Spain, the court held, that provisions,
*141 being *neutral property, but the growth of the enemy's

(*a*) Journals of the Confederation Congress, vol. i. 241.
(*b*) 1 Wheaton, 382.

country, and destined for the supply of the enemy's military or naval force, were contraband. The court observed, that, by the modern law of nations, provisions were not generally contraband, but they might become so on account of the particular situation of the war, or on account of their destination. If destined for the ordinary use of life in the enemy's country, they were not contraband; but it was otherwise if destined for the army or navy of the enemy, or for his ports of military or naval equipment. And if the provisions were the growth of the enemy's country, and destined for the enemy's use, they were to be treated as contraband, and liable to forfeiture, even though the army or navy were in a neutral port, for it would be a direct interposition in the war.

This case followed the decisions of Sir William Scott, and carried the doctrine of contraband, as applied to provisions, to as great an extent. It held the voyage of the Swedish neutral so illegal, as to deserve the infliction of the penalty of loss of freight.

It is the *usus bellici* which determined an article to be contraband; and as articles come into use as implements of war which were before innocent, there is truth in the remark, that as the means of war vary and shift from time to time, the law of nations shifts with them; not, indeed, by the change of principles, but by a change in the application of them to new cases, and in order to meet the varying inventions of war. When goods are once clearly shown to be contraband, confiscation to the captor is the natural consequence. This is the practice in all cases, as to the article itself, excepting provisions; and as to them, when they become contraband, the ancient and strict right of forfeiture is softened down to a right of pre-emption on reasonable terms. (*a*) But, generally, to stop contraband goods, would, * as * 142 Vattel observes, (*a*) prove an ineffectual relief, especially at sea. The penalty of confiscation is applied, in order that the fear of loss might operate as a check on the avidity for gain, and deter the neutral merchant from supplying the enemy with contraband articles. The ancient practice was, to seize the contraband goods, and keep them, on paying the value. But the modern practice of confiscation is far more agreeable to the mutual duties of nations, and more adapted to the preservation of their rights.

(*a*) Case of the Haabet, 2 Rob. Adm. 182.

(*a*) B. 3, c. 7, sec. 113.

It is a general understanding, grounded on true principles, that the powers at war may seize and confiscate all contraband goods, without any complaint on the part of the neutral merchant, and without any imputation of a breach of neutrality in the neutral sovereign himself. (*b*) It was contended, on the part of the French nation, in 1796, that neutral governments were bound to restrain their subjects from selling or exporting articles contraband of war to the belligerent powers. But it was successfully shown, on the part of the United States, that neutrals may lawfully sell, at home, to a belligerent purchaser, or carry, themselves, to the belligerent powers, contraband articles subject to the right of seizure, *in transitu*. (*c*) This right has since been explicitly declared by the judicial authorities of this country. (*d*) The right of the neutral to transport, and of the hostile power to seize, are conflicting rights, and neither party can charge the other with a criminal act.

Contraband articles are said to be of an infectious nature,
* 143 and they contaminate the whole cargo belonging to * the same owners. The innocence of any particular article is not usually admitted, to exempt it from the general confiscation. By the ancient law of Europe, the ship, also, was liable to condemnation; and such a penalty was deemed just, and supported by the general analogies of law, for the owner of the ship had engaged it in an unlawful commerce, and contraband goods are seized and condemned *ex delicto*. But the modern practice of the courts of admiralty, since the age of Grotius, is milder; and the act of carrying contraband articles is attended only with the loss of freight and expenses, unless the ship belongs to the owner of the contraband articles, or the carrying of them has been connected with malignant and aggravating circumstances; and among those circumstances, a false destination and false papers are considered as the most heinous. In those cases, and in all cases of fraud in the owner of the ship, or in his agent, the penalty is carried beyond the refusal of freight and expenses, and is extended

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(*b*) Vattel, b. 3, c. 7, sec. 113.

(*c*) M. Adet's Letter to Mr. Pickering, March 11th, 1796; Mr. Pickering's Letters to M. Adet, January 20th and May 25th, 1796; Circular Letter of the Secretary of the Navy to the Collectors, August 4th, 1793.

(*d*) Richardson *v.* Maine Ins. Company, 6 Mass. 113; The Santissima Trinidad, 7 Wheaton, 283.

to the confiscation of the ship, and the innocent parts of the cargo. (*a*) This is now the established doctrine; but it is sometimes varied by treaty, in like manner as all the settled principles and usages of nations are subject to conventional modificatien. (*b*)

A neutral may also forfeit the immunities of his national character by violations of blockade; and among the rights of belligerents, there is none more clear and incontrovertible, or more just and necessary in the application, than that which gives rise to the law of blockade.[2] Bynkershoek (*c*) says, * it is founded on the principles of natural reason, as well as on the usage of nations; and Grotius (*a*) considers the carrying of supplies to a beseiged town, or a blockaded port, as an offence exceedingly aggravated and injurious. They both agree that a neutral may be dealt with severely; and Vattel says he may be treated as an enemy. (*b*) The law of blockade is, however, so harsh and severe in its operation, that, in order to

Law of blockade.

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(*a*) Bynk. Q. J. Pub. b. 1, c. 12 and 14; Heinec. de Nav. ob Vect. Merc. Vetit. com. c. 2, sec. 6; Opera, tom. ii. 348; The Staadt Embden, 1 Rob. Adm. 26; The Jonge Tobias, 1 Rob. Adm. 329; The Franklin, 3 Rob. Adm. 217; The Neutralitet, 3 Rob. Adm. 295; The Edward, 4 Rob. Adm. 68; The Ranger, 6 Rob. Adm. 125. See *infra*, p. 146, note.

(*b*) In the treaty between the United States and the Republic of Colombia, and in that with the Republics of Chili, of Venezuela, and of the Peru-Bolivian Confederation and Ecuador, it is provided, that contraband articles shall not affect the rest of the cargo, or the vessel, for it is declared that they shall be left free to the owner. In these treaties, the articles of contraband are enumerated, and they consist of munitions of war, and other things made up in a military form and for a military use, and cavalry horses, with their furniture, and all materials manufactured, prepared and formed expressly for the purposes of war, either by sea or land. All other merchandises and things are declared to be subjects of lawful commerce.[1]

(*c*) Q. J. Pub. b. 1, c. 4, sec. 11.

(*a*) B. 3, c. 1, sec. 5.

(*b*) B. 3, c. 7, sec. 117.

[1] In the convention between the United States and the King of the Two Sicilies, made October 1, 1855, the articles of contraband are enumerated, and it is provided that contraband articles shall not affect the vessel or the rest of the cargo, whether the rest of the cargo belong to the same or a different owner. 11 U. S. Stat. 642.

[2] Neutrals can question the existence and legality of a blockade. Actual war, whether civil or between independent nations, gives the right to create a blockade. All persons residing within the territory occupied by the Rebels against the authority of the United States, in the existing civil war are liable to be treated as public enemies. The President's proclamation of blockade conclusively ascertains that a state of war existed justifying and requiring a resort to that measure. The Prize causes, 2 Black, 635.

apply it, the fact of the actual blockade must be established by clear and unequivocal evidence; and the neutral must have had due previous notice of its existence; and the squadron allotted for the purposes of its execution must be competent to cut off all communication with the interdicted place or port; and the neutral must have been guilty of some act of violation, either by going in, or attempting to enter, or by coming out with a cargo laden after the commencement of the blockade. The failure of either of the points requisite to establish the existence of a legal blockade amounts to an entire defeasance of the measure, even though the notification of the blockade had issued from the authority of the government itself. (*c*)[1]

A blockade must be existing in point of fact; and, in order to constitute that existence, there must be a power present to enforce it. All decrees and orders, declaring extensive coasts and whole countries in a state of blockade, without the presence of an adequate naval force to support it, are manifestly illegal and void, and have no sanction in public law. The ancient authorities all referred to a strict and actual siege or blockade. The language of Grotius (*d*) is *oppidum obsessum vel Portus clausus*, and the investing power must be able to apply its force to every
*145 point of the *blockaded place, so as to render it dangerous to attempt to enter, and there is no blockade of that part where its power cannot be brought to bear. (*a*) The definition of a blockade given by the convention of the Baltic powers, in 1780, and again in 1801, and by the ordinance of Congress, in 1781, required that there should be actually a number of vessels stationed near enough to the port to make the entry apparently dangerous. The government of the United States has uniformly insisted that the blockade should be effective by the presence of a competent force, stationed and present at or near the entrance of the port; and they have protested, with great energy, against the

(*c*) The Betsey, 1 Rob. Adm. 93; 1 Chitty on Commercial Law, 450; Letter from Mr. Clay, the Secretary of State, to Mr. Tudor, dated October 23d, 1827.

(*d*) B. 3, c. 1, sec. 5.

(*a*) The Mercurius, 1 Rob. Adm. 80; The Betsey, 1 Rob. Adm. 93; The Stert, 4 Rob. Adm. 65; Letter of the Secretary of the Navy to Commodore Preble, February 4th, 1804; Roman Law by Lord Mackenzie, (ed. 1862,) 59.

[1] The Ostsee, 33 E. L. & Eq. 28; The Coosa, 1 Newberry Adm. 393.

application of the right of seizure and confiscation to ineffectual or fictitious blockades. (*b*)

The occasional absence of the blockading squadron, produced by accident, as in the case of a storm, and when the station is resumed with due diligence, does not suspend the blockade, provided the suspension, and the reason of it, be known; and the law considers an attempt to take an advantage of such an accidental removal as an attempt to break the blockade, and as a mere fraud. (*c*) The American government seemed disposed to admit the continuance of the blockade in such a case; (*d*) and the language of the judicial authorities in New York has been in favor of the solidity and justness of the English doctrine of blockade on this * point. (*a*) But if the blockade be raised by the *146 enemy, or by applying the naval force, or a part of it, though only for a time, to other objects, or by the mere remissness of the cruisers, the commerce of neutrals to the place ought to be free. The presence of a sufficient force is the natural criterion by which the neutral is enabled to ascertain the existence of the blockade. He looks only to the matter of fact; and if the blockading squadron is removed when he arrives before the port, and he is ignorant of the cause of the removal, or if he be not ignorant, and the cause be not an accidental one, but voluntary, or produced by an enemy, he may enter, without being answerable for a breach of the blockade. When a blockade is raised voluntarily, or by a superior force, it puts an end to it absolutely; and if it be resumed, neutrals must be charged with notice *de novo*, and without

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(*b*) Mr. King's letter to Lord Grenville, May 23d, 1799; Mr. Marshall's Letter to Mr. King, Sept. 20th, 1799; Mr. Madison's Letter to Mr. Pinckney, October 25th, 1801; Letter of the Secretary of the Navy to Commodore Preble, February 4th, 1804; Mr. Pinckney's Letter to Lord Wellesley, January 14th, 1811. In the convention between Great Britain and Russia, on the 17th of June, 1801, a blockaded port was declared to be, "that where there is, by the disposition of the power which attacks it with ships, stationary or sufficiently near, an evident danger in entering." The definition in the treaty of commerce between the United States and Chili, in May, 1832, art. 15, and the Peru-Bolivian Confederation, in May, 1838, art. 14, of a besieged or blockaded place, is, "one actually attacked by a belligerent force, capable of preventing the entry of the neutral."

(*c*) The Frederick Molke, 1 Rob. Adm. 86; The Columbia, 1 Rob. Adm. 154; The Juffrow Maria Schroeder, 3 Rob. Adm. 155; The Hoffnung, 6 Rob. Adm. 116, 117.

(*d*) Mr. Marshall's letter to Mr. King, September 20th, 1799.

(*a*) Radcliff, J., 2 Johns. Cas. 187; Radcliff *v.* U. Ins. Co. 7 Johns. 38.

reference to the former state of things, before they can be involved in the guilt of a violation of the blockade. (*b*)

The object of a blockade is not merely to prevent the importation of supplies, but to prevent export as well as import, and to cut off all communication of commerce with the blockaded port. The act of egress is as culpable as the act of ingress, if it be done fraudulently; and a ship coming out of a blockaded port is, in the first instance, liable to seizure, and, to obtain a release, the party must give satisfactory proof of the innocence of his intention. (*c*) But according to modern usage, a blockade does not rightfully extend to a neutral vessel found in port when the blockade was instituted, nor prevent her coming out with the cargo *bonâ* *147 *fide* purchased, and laden on board before the * commencement of the blockade. (*a*) The modern practice does not require that the place should be invested by land as well as by sea, in order to constitute a legal blockade; and if a place be blockaded by sea only, it is no violation of belligerent rights for the neutral to carry on commerce with it by inland communications. (*b*)

It is absolutely necessary that the neutral should have had due notice of the blockade, in order to affect him with the penal consequences of a violation of it. This information may be communicated to him in two ways: either actually, by a formal notice from the blockading power; or constructively, by notice to his government, or by the notoriety of the fact. It is immaterial in what way the neutral comes to the knowledge of the blockade. If the blockade actually exists, and he has knowledge of it, he is bound not to violate it. A notice to a foreign government is a notice to all the individuals of that nation; and they are not permitted to aver ignorance of it, because it is a duty of the neutral government to communicate the notice to their people. (*c*) In the case of a blockade without regular notice, notice in fact is generally requisite;

(*b*) Williams *v.* Smith, 2 Caines, 1; Letter of the Secretary of State to Mr. King, September 20th, 1799; The Hoffnung, 6 Rob. Adm. 112.

(*c*) Bynk. Q. J. Pub. b. 1, c. 4; The Frederick Molke, 1 Rob. Adm. 86; The Neptunus, 1 Rob. Adm. 170; The Vrouw Judith, 1 Rob. Adm. 150.

(*a*) The Betsey, 1 Rob. Adm. 93; The Vrouw Judith, 1 Rob. Adm. 150; The Comet, 1 Edw. Adm. 32; Olivera *v.* Union Ins. Co. 3 Wheaton, 183.

(*b*) The Ocean, 3 Rob. Adm. 297; The Stert, Ibid. 299, note; Letter of the Secretary of State to Mr. King, September 20th, 1799.

(*c*) The Neptunus, 2 Rob. Adm. 110; The Adelaide, 2 Rob. Adm. 111, note.

and there is this difference between a blockade regularly notified and one without such notice; that, in the former case, the act of sailing for the blockaded place, with an intent to evade it, or to enter contingently, amounts, from the very commencement of the voyage, to a breach of the blockade; for the port is to be considered as closed up, until the blockade be formally revoked, or actually raised; whereas, in the later case of a blockade *de facto*, the ignorance of the party as to its continuance, may be received as an excuse for sailing to the *blockaded place, *148 on a doubtful and provisional destination. (*a*) The question of notice is a question of evidence, to be determined by the facts applicable to the case. The notoriety of a blockade is of itself sufficient notice of it to vessels lying within the blockaded port. In the case of *The Adelaide*, (*b*) it was the doctrine of the English admiralty, that a notification given to one state must be presumed, after a reasonable time, to have reached the subjects of neighboring states, and it affects them with the knowledge of the fact, on just grounds of evidence. And after the blockade is once established, and due notice received, either actually or constructively, the neutral is not permitted to go to the very station of the blockading force, under pretence of inquiring whether the blockade had terminated, because this would lead to fraudulent attempts to evade it, and would amount in practice to a universal license to attempt to enter, and on being prevented, to claim the liberty of going elsewhere. Some relaxation was very reasonably given to this rule, in its application to distant voyages from America; and ships sailing for Europe, before knowledge of the blockade reached them, were entitled to notice, even at the blockaded port. If they sailed after notice, they might sail on a contingent destination for the blockaded port, with the purpose of calling for information at some European port, and be allowed the benefit of such a contingent destination, to be rendered definite by the information. But in no case is the information, as to the existence of the blockade to be sought at the mouth of the port. (*c*)

A neutral cannot be permitted to place himself in the vicinity of a blockaded port, if his situation be so near that he may, with impunity, break the blockade whenever *he pleases, *149

(*a*) The Columbia, 1 Rob. Adm. 154; The Neptunus, 2 Rob. Adm. 110.
(*b*) 2 Rob. Adm. 111, *in notis*.
(*c*) The Spes and Irene, 5 Rob. Adm. 76.

and slip in without obstruction. If that were to be permitted, it would be impossible that any blockade could be maintained. It is a presumption, almost *de jure*, that the neutral, if found on the interdicted waters, goes there with an intention to break the blockade; and it would require very clear and satisfactory evidence to repel the presumption of a criminal intent. (*a*) [1]

The judicial decisions in England and in this country have given great precision to the law of blockade, by the application of it to particular cases, and by the extent, and clearness, and equity of their illustrations. They are distinguished, likewise, for general coincidence and harmony in their principles. All the cases admit, that the neutral must be chargeable with knowledge, either actual or constructive, of the existence of the blockade, and with an intent, and with some attempt, to break it, before he is to suffer the penalty of a violation of it. The evidence of that intent, and of the overt act, will greatly vary, according to circumstances; and the conclusion to be drawn from those circumstances will depend, in some degree, upon the character and judgment of the prize courts; but the true principles which ought to govern have rarely been a matter of dispute. The fact of clearing out or sailing for a blockaded port is, in itself, innocent, unless it be accompanied with knowledge of the blockade. Such a vessel not possessed of such previous knowledge is to be first warned of the fact, and a subsequent attempt to enter constitutes the breach. This was the provision in the treaty with England, in 1794, and it has been declared in other cases, and is considered to be a correct exposition of the law of nations. (*b*)

(*a*) The Neutralitet, 6 Rob. Adm. 30; The Charlotte Christine, 6 Rob. Adm. 101; The Gute Erwartung, 6 Rob. Adm. 182; Bynk. Q. J. Pub. b. 1, c. 11; The Arthur, 1 Edw. Adm. 202; Radcliff *v.* United Ins. Co. 7 Johns. 47; Fitzsimmons *v.* Newport Ins. Co. 4 Cranch, 185.

(*b*) Fitzsimmons *v.* Newport Ins. Co. 4 Cranch, 185; British Instructions to their fleets on the West India station, 5th of January, 1804; Letter of the Secretary of the Navy to Commodore Preble, February 4th, 1804; Treaty between the United States and the Republic of Chili, May, 1832, art. 17, and between the United States and Venezuela, May, 1836, art. 20.

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[1] The property of a neutral is not liable to condemnation for a breach of blockade by a vessel in which he embarks, when entering or departing from port, unless he knew of the intention of the vessel to break it in going out. United States *v.* Guillem, 11 How. U. S. 47.

A neutral leaving a belligerent country, in which he was domiciled at the commencement of war, is entitled to the rights of a neutral as soon as he sails from the hostile port. Ibid. see *ante*, pp. [75, 78.]

*It has been a question in the courts of this country, *150 whether they ought to admit the law of the English prize courts, that sailing for a blockaded port, knowing it to be blockaded, was, in itself, an attempt, and an act sufficient to charge the party with a breach of the blockade, without reference to the distance between the port of departure and the port invested, or to the extent of the voyage performed when the vessel was arrested. (*a*) But in *Yeaton* v. *Fry*, (*b*) the Supreme Court of the United States coincided essentially with the doctrine of the English prize courts; for they held, that sailing from Tobago for Curaçoa, knowing the latter to be blockaded, was a breach of the blockade; and, according to the opinion of Mr. Justice Story, in the case of *The Nereide*, (*c*) the act of sailing with an intent to break a blockade is a sufficient breach to authorize confiscation. The offence continues, although at the moment of capture the vessel be, by stress of weather, driven in a direction from the port, for the hostile intention still remains unchanged. The distance or proximity of the two ports would certainly have an effect upon the equity of the application of the rule. A Dutch ordinance, in 1630, declared that vessels bound to the blockaded ports of Flanders were liable to confiscation, though found at a distance from them, unless they had voluntarily altered the voyage before coming in sight of the port; and Bynkershoek contends for the reasonableness of the order. (*d*) What that distance must be is not defined; and if the ports be not very wide apart, the act of sailing for the blockaded port may reasonably be deemed evidence of a breach of it, and an overt act of fraud upon the belligerent rights. But a relaxation of the rule has been required and granted in the case of distant voyages, *such *151 as those across the Atlantic; and the vessel is allowed to sail on a contingent destination for a blockaded port, subject to the duty of subsequent inquiry at suitable places. (*a*) The ordinance of Congress, of 1781, seems to have conceded this point to the extent of the English rule, for they made it lawful to take and con-

(*a*) Fitzsimmons *v.* Newport Ins. Co. 4 Cranch, 185; Vos & Graves *v.* U. Ins. Co. 2 Johns. Cas. 180, 469.

(*b*) 5 Cranch, 335.

(*c*) 9 Cranch, 440, 446.

(*d*) Q. J. Pub. b. 1, c. 11; 3 Rob. Adm. 326, *in notis*.

(*a*) 5 Rob. Adm. 76; 6 Cranch, 29; Sperry *v.* The Delaware Ins. Co. 2 Wash. C. C. 243; Naylor *v.* Taylor, 9 Barn. & Cress. 718.

demn all vessels, of all nations, "destined to any such port," without saying anything of notice or proximity. (*b*) [1]

The consequence of a breach of blockade is the confiscation of the ship; and the cargo is always, *primâ facie*, implicated in the guilt of the owner or master of the ship; and it lays with them to remove the presumption that the vessel was going in for the benefit of the cargo, and with the direction of the owner. (*c*) The old doctrine was much more severe, and often inflicted, not merely a forfeiture of the property taken, but imprisonment, and other personal punishment; (*d*) but the modern and milder usage has confined the penalty to the confiscation of the ship and goods. If a ship has contracted guilt by a breach of blockade, the offence is not discharged until the end of the voyage. The penalty never travels on with the vessel further than to the end of the return voyage; and if she is taken in any part of that voyage, she is taken *in delicto*. This is deemed reasonable, because no other opportunity is afforded to the belligerent force to vindicate the law. (*e*) The pen-
*152 alty for a *breach of blockade is also held to be remitted, if the blockade has been raised before the capture. The *delictum* is completely done away when the blockade ceases. (*a*)

Neutral carrying enemy's despatches.

There are other acts of illegal assistance afforded to a belligerent besides supplying him with contraband goods, and relieving his distress, under a blockade. Among these

(*b*) Journals of Congress, vol. vii. p. 186. The mere act of sailing to a blockaded port is not an offence, if there was no premeditated design of breaking the blockade, though it should be found to continue when the vessel arrives off the port. See the opinion of Sir Wm. Scott, in the case of The Shepherdess, 5 Rob. Adm. 264; and of Lord Tenterden, in Naylor *v.* Taylor, 9 Barn. & Cress. 718; and of Tindal Ch. J., in Medeiros *v.* Hill, 8 Bing. 231.

(*c*) The Mercurius, 1 Rob. Adm. 80; The Columbia, 1 Rob. Adm. 154; The Neptunus, 3 Rob. Adm. 173; The Alexander, 4 Rob. Adm. 93; The Exchange, 1 Edw. Adm. 39; U. S. *v.* Guillem, 11 How. U. S. 47, 62.

(*d*) Bynk. Q. J. Pub. b. 1, c. 11.

(*e*) The Welvaart Van Pillaw, 2 Rob. Adm. 128; The Juffrow Maria Schroeder, 3 Rob. Adm. 147. In cases of contraband, the return voyage has not usually been deemed connected with the outward, and the offence was deposited with the offending subject; but in distant voyages, with contraband and false papers, the rule is different; the fraud contaminates the return cargo, and subjects it to condemnation, as being one entire transaction. The Rosalie and Betty, 2 Rob. Adm. 343; The Nancy, 3 Rob. Adm. 122; Carrington *v.* The Merchants' Ins. Co. 8 Peters U. S. 495.

(*a*) The Lisette, 6 Rob. Adm. 387.

[1] Brig Nayade, 1 Newberry Adm. 366.

acts, the conveyance of hostile despatches is the most injurious, and deemed to be of the most hostile and noxious character. The carrying of two or three cargoes of stores is necessarily an assistance of a limited nature; but in the transmission of despatches may be conveyed the entire plan of a campaign, and it may lead to a defeat of all the projects of the other belligerent in that theatre of the war. The appropriate remedy for this offence is the confiscation of the ship; and in doing so, the courts make no innovation on the ancient law, but they only apply established principles to new combinations of circumstances. There would be no penalty in the mere confiscation of the despatches. The proper and efficient remedy is the confiscation of the vehicle employed to carry them; and if any privity subsists between the owners of the cargo and the master, they are involved by implication in his delinquency. If the cargo be the property of the proprietor of the ship, then, by the general rule, *ob continentiam delicti*, the cargo shares the same fate, and especially if there was an active interposition in the service of the enemy, concerted and continued in fraud. (*b*)

A distinction has been made between carrying despatches of the enemy between different parts of his dominions and carrying despatches of an ambassador from a neutral *country *153 to his own sovereign. The effect of the former despatches is presumed to be hostile; but the neutral country has a right to preserve its relations with the enemy, and it does not necessarily follow that the communications are of a hostile nature.[1] Ambassadors resident in a neutral country are favorite objects of the

(*b*) The Atalanta, 6 Rob. Adm. 440.

[1] The affair of the Trent, West Indian mail, gave rise to an important question of maritime law deeply affecting the rights of neutrals. In November, 1861, Captain Wilkes, of the United States war-steamer San Jacinto, after firing a round shot and a shell, boarded the English mail-packet Trent, in Old Bahama Channel, on its passage from Havana to Southampton, and by force carried off Messrs. Mason and Slidell, two rebel ministers from the Confederate States, so called, who were taken on board as passengers bound for England. Mason and Slidell were conveyed to America and committed to prison; but after a formal requisition by Britain, declaring the capture to be illegal, they were surrendered by the Federal government, there having been no proceedings in reference to the case by a prize court. See Mr. Sumner's Speech in the United States Senate, January 9, 1862; Despatch of the French government to the Cabinet at Washington by M. Thouvenel, Minister of the Emperor for Foreign Affairs; the State-paper of Mr. Seward, United States Secretary of State; Lord Mackenzie, in his Roman Law, pp. 60 to 62, — all in reference to the case of the Trent.

protection of the law of nations, and their object is to preserve the relations of amity between the governments; and the presumption is, that the neutral state preserves its integrity, and is not concerned in any hostile design. (*a*)

Right of search at sea.

In order to enforce the rights of belligerent nations against the delinquencies of neutrals, and to ascertain the real as well as assumed character of all vessels on the high seas, the law of nations arms them with the practical power of visitation and search. The duty of self-preservation gives to belligerent nations this right. It is founded upon necessity, and is strictly and exclusively a war right, and does not rightfully exist in time of peace, unless conceded by treaty. (*b*) All writers upon the law of nations, and the highest authorities, acknowledge the right in

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(*a*) The Caroline, 6 Rob. Adm. 461; Martens's Summary, b. 7, c. 13.

(*b*) The Le Louis, 2 Dod. Adm. 248; The Antelope, 10 Wheaton, 119. Yet the British Parliament, by statute, in August, 1839, in order more effectually to suppress the slave-trade, and especially as against Portugal, a power that had grossly violated her treaty with England on that subject, authorized the power of visitation and search in time of peace. The British government disclaim the right *of search* in time of peace, but they claim at all times the right *of visit*, in order to know whether a vessel, pretending, for instance, to be American, and hoisting the American flag, be really what she seems to be. Lord Aberdeen's Despatch of December, 1841, to the American Minister, Mr. Stevenson. But the government of the United States do not admit the distinction between the right of visitation and the right of search. They consider the difference to be one rather of definition than principle, and that it is not known to the law of nations. They will not admit the exercise of the claim of visit to be a *right;* while the British government concedes that if, in the *exercise of the right of visit* to ascertain the genuineness of the flag which a suspected vessel bears, any injury ensues, prompt reparation would be made. *The mutual right of visitation and search* in reference to the slave-trade has even been conceded by the European governments of Austria, France, Great Britain, Prussia, and Russia, who were parties to the Quintuple Treaty at London, of December, 1841. See Mr. Webster's Despatch, as American Secretary of State, to Mr. Everett, the American Minister at London, of March 28, 1843. This treaty was subsequently ratified by all the contracting parties except France, who remained bound only to a restrictive right of search under the conventions of 1831 and 1833. The inter-visitation of ships at sea is a branch of the law of self-defence, and is, in point of fact, practised by the public vessels of all nations, including those of the United States, when the piratical character of a vessel is suspected. The right of visit is conceded for the sole purpose of ascertaining the real national character of the vessel sailing under suspicious circumstances, and is wholly distinct from the right of search. It has been termed, by the Supreme Court of the United States, *the right of approach* for that purpose; (The Marianna Flora, 11 Wheaton, 1, 43;) and it is considered to be well warranted by the principles of public law and the usages of nations. Bynk. Q. J. Pub. lib. i. c. 114, S. P. See Wheaton's "Inquiry into the validity of the British claim to a right of visitation and search of American vessels suspected to be engaged in the African slave-trade." 1842.

time of war as resting on sound principles of public jurisprudence, and upon the institutes and practice of all great maritime powers. (*c*) And if, upon making the search, the vessel be found employed in contraband trade, or in carrying enemy's property or troops, or despatches, she is liable to be taken and brought in for adjudication, before a prize court.[2]

Neutral nations have frequently been disposed to question and resist the exercise of this right. This was particularly the case with the Baltic confederacy during the American war, and with the convention of the Baltic powers, in 1801. The right of search was denied, and the flag of the state was declared to be a substitute for all documentary and other proof, and to exclude all right of search. Those powers armed for the purpose of defending their neutral * pretensions; and England did not hesi- * 154
tate to consider it as an attempt to introduce, by force, a new code of maritime law inconsistent with her belligerent rights, and hostile to her interests, and one which would go to extinguish the right of maritime capture. The attempt was speedily frustrated and abandoned, and the right of search has, since that time, been considered incontrovertible. (*a*)

The whole doctrine was ably discussed in the English high court of admiralty, in the case of *The Maria*, (*b*) and it was adjudged, that the right was incontestable, and that a neutral sovereign could not, by the interposition of force, vary that right. Two powers may agree among themselves that the presence of one of their armed ships, along with their merchant ships, shall be mutually understood to imply that nothing is to be found in that convoy of merchant ships inconsistent with amity or neutrality. (*c*)[1]

(*c*) Vattel, b. 3, c. 7, sec. 114; Ord. de la Marine, of 1681, art. 12; Hübner, de la Saisie des Batimens Neutres; The Maria, 1 Rob. Adm. 340; The Le Louis, 2 Dod. Adm. 245; The Marianna Flora, 11 Wheaton, 42.

(*a*) In the convention between England and Russia, on the 17th of June, 1801, Russia admitted the belligerent right of search, even of merchant vessels navigating under convoy of a ship of war, provided it was exercised by a ship of war belonging to government.

(*b*) 1 Rob. Adm. 340.

(*c*) In the treaty of commerce between the United States and the Republic of Chili,

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[2] The Speech of Mr. Sumner in the United States Senate, January 9, 1862; The Rapid, Edw. Adm. 221.

[1] See the Treaties with Peru, San Salvador, and Guatemala, 10 U. S. Stat.

But no belligerent power can legally be compelled, by mere force, to accept of such a pledge; and every belligerent power who is no party to the agreement has a right to insist on the only security known to the law of nations on this subject, independent of any special covenant, and that is the right of personal visitation and search, to be exercised by those who have an interest in making it. The penalty for the violent contravention of this right, is the confiscation of the property so withheld from visitation; and the infliction of this penalty is conformable to the settled practice of nations, as well as to the principles of the municipal jurisprudence of most countries in Europe. There may be cases in which the master of a neutral ship may be authorized, by the natural right of self-preservation, to defend himself against extreme violence threatened by a cruiser, grossly abusing his commission; but, except in extreme cases, a merchant vessel has no right to say for itself, and an armed vessel has no right to say for it, that it will not submit to visitation or search, or be carried into a
*155 proximate port for judicial inquiry. Upon *these principles, a fleet of Swedish merchant ships, sailing under convoy of a Swedish ship of war, and under instructions from the Swedish government to resist, by force, the right of search claimed by British lawfully commissioned cruisers, was condemned. The resistance of the convoying ship was a resistance of the whole convoy, and justly subjected the whole to confiscation. (*a*)

The doctrine of the English admiralty on the right of visitation and search, and on the limitation of the right, has been recognized, in its fullest extent, by the courts of justice in this country. (*b*) The very act of sailing under the protection of a belliger-

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in 1832, it was agreed, that the right of visitation and search should not apply to vessels sailing under convoy. So, also, in the convention between the United States and the Peru-Bolivian Confederacy of 1838, art. 19.

(*a*) The Maria, 1 Rob. Adm. 340; The Elsabe, 4 Rob. Adm. 408.

(*b*) The Nereide, 9 Cranch, 427, 438, 443, 445, 453; The Marianna Flora, 11 Wheaton, 42. The government of the United States admits the right of visitation and search by belligerent government vessels of their private merchant vessels, for enemy's property, articles contraband of war, or men in the land or naval service of the enemy. But it does not understand the law of nations to authorize, and does not admit, the right of search for subjects or seamen. England, on the other hand, asserts the right to look for her subjects on the high seas, into whatever service they might wander, and will not renounce it. The objections to the British claim, on the ground of public law and policy, were stated with great force and clearness, in 1818, by the

ent or neutral convoy, for the purpose of resisting search, is a violation of neutrality. The Danish government asserted the same principle in its correspondence with the government of the United States, and in the royal instructions of the 10th of March, 1810, (*c*) and none of the powers of Europe have called in question the justice of the doctrine. (*d*) Confiscation is applied, by way of penalty for resistance of search, to all vessels, without any discrimination as to the national character of the vessel or cargo, and without separating the fate of the cargo from that of the ship.

This right of search is confined to private merchant vessels, and does not apply to public ships of war. Their immunity from the exercise of any civil or criminal jurisdiction but that of the sovereign power to which they belong, is uniformly asserted, claimed, and conceded. A contrary doctrine is not to be found in any jurist or writer on the law of nations, or * admitted * 156 in any treaty; and every act to the contrary has been promptly met and condemned. (*a*)

American Minister in London to Lord Castlereagh. Rush's Memoranda, pp. 181–193, 279–283. The claim of Great Britain to the right of search, on the high seas, of neutral vessels, for deserters and other persons liable to military and naval service, has been a question of animated discussion between that government and the United States. It was one principal cause of the war of 1812, and remains unsettled to this day. In the discussions in 1842, between Lord Ashburton and Mr. Webster, relative to the boundary line of the State of Maine, the American Minister incidentally discussed the subject, and intimated that the rule hereafter to be insisted on would be, that every regularly documented American merchant vessel was evidence that the seamen on board were American, and would find protection under the American flag.

(*c*) 4 Hall's Law Journal, 263; Letters of Count Rosenkrantz to Mr. Erving, 28th and 30th June, and 9th July, 1811.

(*d*) The Austrian ordinance of neutrality of August 7th, 1803, enjoined it upon all their vessels to submit to visitation on the high seas, and not to make any difficulty as to the production of the documentary proofs of property.

(*a*) Thurlow's State Papers, vol. ii. p. 503; Casaregis's Discourses, 136; Mr. Canning's Letter to Mr. Monroe, August 3d, 1807; Edinburgh Review for October, 1807, art. 1. In the case of Prins Frederik, 2 Dod. Adm. 451, the question was raised, and learnedly discussed, whether a public armed ship, belonging to the King of the Netherlands, was liable to civil or criminal process in a British port. She was brought in, by assistance, in distress, and salvage was claimed, and the ship was arrested upon that claim, and a plea to the jurisdiction interposed. The question went off by arrangement, and was not decided, though the immunity of such vessels from all private claims was forcibly urged, on grounds of general policy and the usage of nations. And in this country, in the case of The Schooner Exchange *v.* M'Faddon, 7 Cranch, 116, it was decided after great discussion, that a public vessel of war of a foreign sovereign, at peace with the United States, coming into their ports, and demeaning herself in a friendly manner, was exempt from the jurisdiction of the

The exercise of the right of visitation and search must be conducted with due care and regard to the rights and safety of the

country. L'Invincible, 1 Wheaton, 238, 252, S. P. In that interesting case, The Schooner Exchange, it was shown, that the exemption of a public ship in port from the local jurisdiction was not founded on the absolute right of another sovereign to such an exemption, but upon principles of public comity and convenience, and arose from the presumed consent of nations; that consent might be withdrawn, upon notice, without just offence; and if a foreign ship, after such notice, comes into the port, she becomes amenable to the local laws in the same manner as other vessels; and though a public ship and her armament might be excepted, the prize property which she brings into port is subject to the local jurisdiction, for the purpose of examination and inquiry, and, in a proper case, for restitution. It has been asserted, on the part of the executive authority of the United States, that a writ of *habeas corpus* may be lawfully awarded, to bring up a subject illegally detained on board a foreign ship of war in our waters. Opinion of the Attorney-General of the United States, June 24, 1794. (Opinions of the Attorneys-General, vol. i. 47.)[1] So, also, it was the official opinion of the Attorney-General of the United States, in 1799, that it was lawful to serve civil or criminal process upon a person on board a foreign ship of war lying within a harbor of the United States. Ib. vol. i. 55–57. These opinions do not apply, of course, to any process against the ship itself. Mr. Webster, the American Secretary of State, in his diplomatic letter to Lord Ashburton, the British Minister, at Washington, of the date of August 1st, 1842, contended, that if a vessel be driven by stress of weather, or other necessity, or carried by unlawful force, into a British port, even if it be a prohibited or blockaded port, that necessity exempted the vessel from all penalty and all hazard; that a vessel on the high seas is regarded as part of the territory of the nation to which she belongs, and subject to its exclusive jurisdiction; and if it be forced by such necessity into a foreign port, her immunities continue by the comity and practice of nations: that the jurisdiction continues, though the vessel be *at anchor*, in the foreign port; so that if a murder be committed on board a vessel in a foreign port, by one of the crew, or a passenger, on another of the crew, or a passenger, the offence is cognizable by the courts of the nation to which the vessel belongs; that the vessel, while water-borne in foreign places, was, for the general *purpose of governing and regulating the rights, duties, and obligations of those on board*, considered as part of the territory to which she belonged, and that local laws did not affect existing relations between persons on board. He further stated that, by the comity and practice of nations, *merchant vessels* going voluntarily into a foreign port for trade, retain on board, for their protection and government, the jurisdiction and laws of their own country. These immunities were presumed to exist as a part of civilization, and to be allowed until expressly retracted. This presumption is deemed to be part of the voluntary and adopted law of nations. The case of a vessel forced by necessity into a foreign port, placed the claim for exemption from interference on higher principles and stronger courtesy. If the vessel has slaves on board, the foreign government has no right to enter on board and interfere with that relation. It was admitted, however, that the exemption from the local jurisdiction could not be claimed for unlawful acts done, and contracts made,

[1] If no express convention refuse to the public ships of belligerents the privileges of asylum in our waters, they and their prizes, while lying inoffensively in any harbor of the United States, are exempt from the local jurisdiction. Opinions of the Attorneys-General, vol. vii. p. 122. (18 Law Rep. 241.)

vessels. (*b*) If the neutral has acted with candor and good faith, and the inquiry has been wrongfully pursued, the belligerent

on board the vessel so placed. See *supra*, pp. 98, 116, n. and *infra*, p. 362. The act of Congress giving jurisdiction in cases of felony, committed in a foreign port, as in the case stated by Mr. Webster, assumes, and impliedly admits, a concurrent jurisdiction in the courts of the territory where the vessel was at the time. Lord Ashburton, in his reply of the 6th of August, declined the discussion of the question of immunity in harbor, on general principles, and said, that Mr. Webster had advanced some propositions which rather surprised and startled him, though he did not pretend to judge of them. He admitted, that in the case of American vessels, driven by necessity into a British port, there ought not to be any officious interference with them, nor any further inquisition into the state of persons or things on board than might be indispensable to enforce the observance of the municipal laws of the country, and the proper regulations of its harbors and waters. The principles of national law, stated in the diplomatic correspondence above referred to, were judicially recognized by the Supreme Court of Louisiana, in the case of McCargo *v.* New Orleans Ins. Company, 10 Robinson's R. 202, 316. It was there declared to be a true exposition of the law of nations, that a vessel on the high seas, in time of peace, engaged in a lawful voyage, was under the exclusive jurisdiction of the state to which her flag belongs; and that if forced by necessity into a port of a friendly power, she loses none of the rights appertaining to her on the high seas; but herself and cargo, and the persons on board, with their property, and all the rights incident to their personal relations, as established by the laws of the state to which they belong, were placed under the protection which the law of nations extends to the unfortunate under such circumstances. Although the jurisdiction of the nation over the vessel belonging to it be not wholly exclusive, and though, for any unlawful acts committed, while in such a situation, by the master, crew, or owners, she or they may be responsible to the laws of the place, yet the local laws do not supersede the laws of the country to which the vessel belongs, so far as relates to the rights, duties, and obligations of those on board; and that whatever might be the state of the foreign law in relation to slavery, it did not operate on board the vessel so forced by necessity into the foreign port, and before a voluntary landing of the slaves on board, to dissolve the relation of master and slave.

Two cases, in which this interesting subject was discussed, are cited from Ortolan, Règles Internationales de la Mer, tom. i. in Wheaton's Elements, 3d ed. pp. 152 – 154, in which it was decided by the council of state, in 1806, in the French courts, that foreign private vessels in French ports, for the purpose of trade, were exempted from the local jurisdiction, as to acts of mere international discipline of the vessel, and even as to crimes and offences committed by a person forming a part of its officers and crew, against another person belonging to the same, when the peace of the port is not disturbed. But the local jurisdiction is properly asserted as to crimes committed on board the vessel against persons not forming part of its officers and crew, or by any

(*b*) The Anna Maria, 2 Wheaton, 327. The right of visitation and search is sometimes laid under special restrictions, by convention between maritime states. See, for instance, art. 17 of the convention of navigation and commerce between the United States and the Peru-Bolivian Confederation, May, 1838.[1]

[1] Treaties made by the United States with Guatemala, March 3d, 1849, and with Peru, July 25th, 1851, embody most of the liberal provisions for international privileges,

cruiser is responsible to the neutral in costs and damages, to be assessed by the prize court which sustains the judicial examination. The mere exercise of the right of search, involves the cruiser in no trespass, for it is strictly lawful; but if he proceeds to capture the vessel as prize, and sends her in for adjudication, and there be no probable cause, he is responsible. It is not the search, but the subsequent capture, which is treated in such a case as a tortious act. (*c*) If the capture be justifiable, the subsequent detention for adjudication is never punished with damages; and in all cases of marine torts, courts of admiralty exercise a large discretion in giving or withholding damages. (*d*) [1]

* 157 * A rescue effected by the crew after capture, and when the captors are in actual possession, is unlawful, and considered to be a resistance within the application of the penalty of confiscation, for it is delivered by force from force. (*a*) And where the penalty attaches to all, it attaches as completely to the cargo as to the ship, for the master acted as agent of the owner of the

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other than a person belonging to the same, or those committed by the officers and crew upon each other, if the peace of the port be thereby disturbed; and the jurisdiction, also, is exercised as to civil contracts made with persons not belonging to the vessel. These were the cases of The Newton, at Antwerp, and of The Sally, at Marseilles. These cases show a liberal relaxation of the strict rights of the local jurisdiction, and so they are regarded by Mr. Wheaton. Another important principle of international jurisprudence was declared by the French Court of Cassation, in 1832, in the case of The Carlo Alberto, (Sirey, Recueil Général de Jurisprudence, tom. xxxii. p. 578, cited from Wheaton's Elements, 3d edit. 154,) viz. that by the law of nations, a foreign vessel, allied or neutral, is considered as part of the territory of the nation to which it belongs, and entitled to the privilege of the inviolability of the territory; but that privilege ceases to protect her when having committed acts of hostility in the French territory inconsistent with its character of ally or neutral; and that even the pretext of putting into port in distress will not exclude the jurisdiction of the local tribunals of a charge of high treason against the persons found on board.

(*c*) 2 Mason, 439.

(*d*) Story, J., 11 Wheaton, 54 – 56.

(*a*) The Dispatch, 3 Rob. Adm. 278; Brown *v.* Union Ins. Co. 5 Day, 1.

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and the preservation, during war, of neutral rights, which the neutral nations of Europe have long sought to secure. See these treaties for provisions, as, trade with enemies; definition of blockade; regulation of visitation and search; exemption of confiscation on the commencement of hostilities; reciprocal rights in the citizens to successions and inheritances, &c.

[1] Honest mistake, though induced by the act of their government, will not relieve captors from a liability to costs and damages: for the court imposes these not as a punishment, but by way of indemnity to the neutral for the loss and damage which he has sustained by the wrongful detention. The Ostsee, 33 E. L. & Eq. 28.

cargo, and his resistance was a fraudulent attempt to withdraw it from the rights of war. (*b*)

A neutral is bound not only to submit to search, but to have his vessel duly furnished with the genuine documents requisite to support her neutral character. (*c*) The most material of these documents are, the register, passport, or sea-letter, muster-roll, log-book, charter-party, invoice, and bill of lading. The want of some of these papers is strong presumptive evidence against the ship's neutrality; yet the want of any one of them is not absolutely conclusive. (*d*) *Si aliquid ex solemnibus deficiat, cum æquitas poscit subveniendum est.* The concealment of papers material for the preservation of the neutral character justifies a capture, and carrying into port for adjudication, though it does not absolutely require a condemnation. It is good ground to refuse costs and damages on restitution, or to refuse further proof to relieve the obscurity of the case, where the cause labored under heavy doubts, and there was *primâ facie* ground for condemnation independent of the concealment. (*e*) The spoliation of papers is a still more aggravated and inflamed circumstance of suspicion. That fact may exclude further * proof, and * 158 be sufficient to infer guilt; but it does not, in England, as it does by the maritime law of other countries, create an absolute presumption *juris et de jure;* and yet a case that escapes with such a brand upon it is saved so as by fire. (*a*) The Supreme Court of the United States has followed the less rigorous English rule, and held that the spoliation of papers was not, of itself, sufficient ground for condemnation, and that it was a circum-

Neutral documents.

(*b*) The Catherina Elizabeth, 5 Rob. Adm. 232.

(*c*) Answer to the Prussian Memorial, 1753; Hübner, de la Saisie des Batimens Neutres; 1 Arnold Ins. 623 *et seq.;* 2 Parsons Maritime Law, 114.

(*d*) Danish Instructions, 10th March, 1810. The register of a vessel is the only document which need be on board a vessel in time of universal peace, to prove national character. Catlett *v.* Pacific Ins. Co. 1 Paine, C. C. 594. By the convention of navigation and commerce between the United States and the Peru-Bolivian Confederation, May, 1838, art. 18, the vessels of each power are to be furnished in time of war with sea-letters or passports, describing the name, property, and burden of the ship, and name and residence of the commander. So they must also be provided with certificates, containing the particulars of the cargo, and the place whence the ship sailed, signed by the officers of the port.

(*e*) Livingston *v.* Maryland Ins. Co. 7 Cranch, 544; 2 Parsons Maritime Law, 115; 1 Arnold Ins. 630, 631.

(*a*) The Hunter, 1 Dod. Adm. 480.

stance open for explanation, for it may have arisen from accident, necessity, or superior force. (*b*) If the explanation be not prompt and frank, or be weak and futile; if the cause labors under heavy suspicions, or there be a vehement presumption of bad faith, or gross prevarication, it is good cause for the denial of further proof; and the condemnation ensues from defects in the evidence, which the party is not permitted to supply. The observation of Lord Mansfield, in *Bernardi* v. *Motteux*, (*c*) was to the same effect. By the maritime law of all countries, he said, throwing papers overboard was considered as a strong presumption of enemy's property; but, in all his experience, he had never known a condemnation on that circumstance only.

(*b*) The Pizarro, 2 Wheaton, 227. (*c*) Doug. Rep. 581.

LECTURE VIII.

OF TRUCES, PASSPORTS, AND TREATIES OF PEACE.

HAVING considered the rights and duties appertaining to a state of war, I proceed to examine the law of nations relative to negotiations, conventions, and treaties, which either partially interrupt the war, or terminate in peace.

(1.) A truce or suspension of arms does not terminate the war, but it is one of the *commercia belli* which suspends its operations. These conventions rest upon the obligation of good faith, and as they lead to pacific negotiations, and are necessary to control hostilities, and promote the cause of humanity, they are sacredly observed by civilized nations. Effect of a truce.

A particular truce is only a partial cessation of hostilities, as between a town and an army besieging it. But a general truce applies to the operations of the war; and if it be for a long or indefinite period of time, it amounts to a temporary peace, which leaves the state of the contending parties, and the questions between them, remaining in the same situation as it found them. A partial truce may be made by a subordinate commander, and it is a power necessarily implied in the nature of his trust; but it is requisite to a general truce, or suspension of hostilities throughout the nation, or for a great length of time, that it may be made by the sovereign of the country, or by his special authority.(*a*) The general principle on the subject *is, that if *160 a commander makes a compact with the enemy, and it be of such a nature that the power to make it could be reasonably implied from the nature of the trust, it will be valid and binding though he abuse his trust. The obligation he is under not to abuse his trust regards his own state, and not the enemy. (*a*)

A truce binds the contracting parties from the time it is concluded, but it does not bind the individuals of the nation so as to render them personally responsible for a breach of it, until they

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(*a*) Vattel, b. 3, c. 16, sec. 233 – 238; Grotius, b. 8, c. 21.

(*a*) Rutherforth, b. 2, c. 9; Vattel, b. 3, c. 16, sec. 261; Grotius, b. 3, c. 22, sec. 4.

have had actual or constructive notice of it. Though an individual may not be held to make pecuniary compensation for a capture made, or destruction of property, after the suspension of hostilities, and before notice of it had reached him, yet the sovereign of the country is bound to cause restoration to be made of all prizes made after the date of a general truce. To prevent the danger and damage that might arise from acts committed in ignorance of the truce, it is common and proper to fix a prospective period for the cessation of hostilities, with a due reference to the distance and situation of places. (*b*)

A truce only temporarily stays hostilities; and each party to it may, within his own territories, do whatever he would have a right to do in time of peace. He may continue active preparations for war, by repairing fortifications, levying and disciplining troops, and collecting provisions and articles of war. He may do whatever, under all the circumstances, would be deemed compatible with good faith and the spirit of the agreement; but he is justly restrained from doing what would be directly injurious to the enemy, and could not safely be done in the midst of hostilities. Thus, in the case of a truce between the governor of a fortified town and the army besieging it, neither party is at liberty to continue works, constructed either for attack or defence, and
*161 which could not safely be done if hostilities had *continued; for this would be to make a mischievous and fraudulent use of the cessation of arms. So, it would be a fraud upon the rights of the besieging army, and an abuse of the armistice, for the garrison to avail themselves of the truce to introduce provisions and succors into the town, in a way, or through passages, which the besieging army would have been competent to prevent. (*a*) The meaning of every such compact is, that all things should remain as they were in the places contested, and of which the possession was disputed, at the moment of the conclusion of the truce. (*b*)

At the expiration of the truce, hostilities may recommence without any fresh declaration of war; but if it be for an indefinite time, justice and good faith require due notice of an intention to terminate it. (*c*)

(*b*) Vattel, b. 3, c. 15, sec. 239, 244.
(*a*) Vattel, b. 3, c. 16, sec. 247, 248.
(*b*) Ibid. sec. 250.
(*c*) Vattel, b. 3, c. 16, sec. 260.

Grotius and Vattel, (*d*) as well as other writers on national law, have agitated the question, whether a truce for a given period, as, for instance, from the first of January to the first of February, will include or exclude the first day of each of these months. Grotius says, that the day from whence a truce is to be computed, is not one of the days of the truce, but that it will include the whole of the first day of February as being the day of its termination. Puffendorf, Heineccius, and Vattel, on the other hand, are of opinion, that the day of the commencement of the truce would be included; and as the time ought to be taken largely and liberally, for the sake of humanity, the last day mentioned would also be included. Every ambiguity of this kind ought always to be prevented, by positive and precise stipulations, as, from such a day to such a day, both inclusive. (*e*)

* (2.) A passport or safe-conduct is a privilege granted in war, and exempting the party from the effects of its operation, during the time, and to the extent prescribed in the permission. It flows from the sovereign authority; but the power of granting a passport may be delegated by the sovereign to persons in subordinate command, and they are invested with that power either by an express commission, or by the nature of their trust. (*a*) The general of an army, from the very nature of his power, can grant safe-conducts; but the permission is not transferable by the person named in the passport, for it may be that the government had special reasons for granting the privilege to the very individual named, and it is presumed to be personal. If the safe-conduct be granted, not for persons, but for effects, those effects may be removed by others besides the owner, provided no person be selected as the agent, against whom there may exist a personal objection, sufficient to render him an object of suspicion or danger, within the territories of the power granting the permission. *162

Of a passport.

He who promises security, by a passport, is morally bound to

(*d*) Grotius, b. 3, c. 21, sec. 4; Vattel, b. 3, c. 16, sec. 244; Puff. b. 8, c. 7, sec. 8; Heinecc. Jur. Nat. et Gent. 2, 9, 208.

(*e*) The rule proposed by the English commissioners, in their report on the practice of the English courts, in July, 1831, is recommended by its simplicity and certainty. They proposed to compute the first day exclusively, and the last day inclusively, in *all cases*. See vol. iv. p. 95, note.

(*a*) Vattel, b. 3, c. 17.

afford it against any of his subjects or forces, and to make good any damage the party might sustain by a violation of the passport. The privilege being so far a dispensation from the legal effects of war, it is always to be taken strictly, and must be confined to the purpose, and place, and time, for which it was granted. A safe-conduct generally includes the necessary baggage and servants of the person to whom it is granted; and, to save doubt and difficulty, it is usual to enumerate, with precision, every particular branch and extent of the indulgence. If a safe-conduct be given for a stated term of time, the person in whose favor it was granted must leave the enemy's country before the time expires, unless detained by sickness, or some unavoidable circumstance, *163 *and then he remains under the same protection. The case is different with an enemy who comes into the country of his adversary during a truce. He, at his own peril, takes advantage of a general liberty allowed by the suspension of hostilities, and, at the expiration of the truce, the war may freely take its course, without being impeded by any claims of such a party for protection. (*a*) [1]

It is stated that a safe-conduct may even be revoked by him who granted it, for some good reason; for it is a general principle in the law of nations, that every privilege may be revoked, when it becomes detrimental to the state. If it be a gratuitous privilege, it may be revoked purely and simply; but if it be a purchased privilege, the party interested in it is entitled to indemnity against all injurious consequences, and every party affected by the revocation is to be allowed time and liberty to depart in safety. (*b*)

Enemy's license to trade.

The effect of a license given by the enemy to the subjects of the adverse party, to carry on a specified trade,

(*a*) Vattel, b. 3, c. 17, sec. 273, 274. (*b*) Vattel, b. 3, c. 17, sec. 276.

[1] Similar in principle to passports, and safe-conducts, are, what are termed in the Articles of War, *safeguards*, which the general-in-chief of an army corps or division is authorized to give hospitals and public establishments of the enemy, and also to individuals, whom it may be the particular interest of the army to protect. "Whosever belonging to the army of the United Sates, employed in foreign parts, shall force a safeguard, shall suffer death." [54th Article of War.]

The foregoing extract is from the Army Regulations of 1825, of which Lieutenant-General Scott was the author, and which he enforced in his Mexican campaign, in 1847, with equal energy and humanity.

has already been considered, (*c*) in respect to the light in which it is viewed by the government of the citizens accepting it. A very different effect is given to these licenses by the government which grants them, and they are regarded and respected as lawful relaxations or suspensions of the rules of war. It is the assumption of a state of peace to the extent of the license, and the act rests in the discretion of the sovereign authority of the state, which alone is competent to decide how far considerations of commercial and political expediency may, in particular cases, control the ordinary consequences of war. In the country which grants them, licenses to carry on a pacific commerce are *stricti juris*, as being exceptions to a general rule; though they are not to be construed with pedantic accuracy, nor will every *small de- *164 viation be held to vitiate the fair effect of them. (*a*) An excess in the quantity of goods permitted to be imported might not be considered as noxious to any extent; but a variation in the quality or substance of the goods might be more significant. Whenever any part of the trade assumed under the license is denuded of any authority under it, such part is subject to condemnation.

Another material circumstance in all licenses, is the limitation of time in which they are to be carried into effect, for what is proper at one time may be very unfit and mischievous at another time. Where a license was limited to be in force until the 29th of September, and the ship did not sail from the foreign port until the 4th of October, yet, as the goods were laden on board by the 12th of September, and there was an entire *bona fides* on the part of the person holding the license, this was held to be legal. (*b*) But where a license was to bring away a cargo from Bordeaux, and the party thought proper to change the license, and accommodate it to another port in France, it was held by the English admiralty, in the case of *The Twee Gebroeders*, (*c*) that the license was vitiated, and

(*c*) *Supra*, p. 81.

(*a*) The Cosmopolite, 4 Rob. Adm. 8; Grotius, b. 3, c. 21, sec. 14, lays down the general rule, that a safe-conduct, of which these licenses are a species, is to be liberally construed; *laxa magis quam stricta interpretatio admittenda est.* And licenses were eventually construed with great liberality in the British courts of admiralty. Judge Croke, in the case of The Abigail, Stewart, Vice-Adm. 360; Duer on Insurance, vol. i. 595 – 619. The English admiralty and common law decisions on this subject of licenses are collected and examined by Mr. Duer, with his usual diligence and sagacity.

(*b*) Schroeder *v.* Vaux, 15 East, 52. 3 Camp. N. P. 83.

(*c*) 1 Edw. Adm. 95.

the vessel and cargo were condemned. It has also been held, that the license must be limited to the use of the precise persons for whose benefit it was obtained. The great principle in these cases is, that subjects are not to trade with the enemy without the special permission of the government; and a material object of the control which the government exercises over such a trade is that it
*165 may judge of the particular persons who are fit to *be intrusted with an exemption from the ordinary restrictions of a state of war. (a)

Treaties of peace.

(3.) The object of war is peace; and it is the duty of every belligerent power to make war fulfil its end with the least possible mischief, and to accelerate, by all fair and reasonable means, a just and honorable peace. The same power which has the right to declare and carry on war, would seem naturally to be the proper power to make and conclude a treaty of peace; but the disposition of this power will depend upon the local constitution of every nation; and it sometimes happens, that the power of making peace is committed to a body of men who have not the power to make war. In Sweden, after the death of Charles XII., the king could declare war without the consent of the national diet, but he made peace in conjunction with the senate. (b) So, by the constitution of the United States, the President, by and with the advice and consent of two thirds of the senate, may make peace, but it is reserved to Congress to declare war. This provision in our Constitution is well adapted (as will be shown more fully hereafter) to unite, in the negotiation and conclusion of treaties, the advantage of talents, experience, stability, and a comprehensive knowledge of national interest, with the requisite secrecy and despatch.

Treaties of peace, when made by the competent power, are obligatory upon the whole nation. If the treaty requires the payment of money to carry it into effect, and the money cannot be raised but by an act of the legislature, the treaty is morally obligatory upon the legislature to pass the law, and to refuse it would be a breach of public faith. The department of the government that is intrusted by the Constitution with the treaty-making

(a) The Jonge Johannes, 4 Rob. Adm. 263. See the law as to licenses, collected in 1 Holt, 129, note. Mr. Holt says, that Sir Wm. Scott was, in fact, the author of the whole learning of the law relating to the system of licenses.

(b) Vattel, b. 4, c. 2, sec. 10.

power is competent to *bind the national faith in its dis- *166
cretion; for the power to make treaties of peace must be coextensive with all the exigencies of the nation, and necessarily involves in it that portion of the national sovereignty which has the exclusive direction of diplomatic negotiations and contracts with foreign powers. All treaties made by that power become of absolute efficacy, because they are the supreme law of the land.

There can be no doubt that the power competent to bind the nation by treaty may alienate the public domain and property by treaty. If a nation has conferred upon its executive department, without reserve, the right of treating and contracting with other states, it is considered as having invested it with all the power necessary to make a valid contract. That department is the organ of the nation, and the alienations by it are valid, because they are done by the reputed will of the nation. The fundamental laws of a state may withhold from the executive department the power of transferring what belongs to the state; but if there be no express provision of that kind, the inference is, that it has confided to the department charged with the power of making treaties a discretion commensurate with all the great interests and wants and necessities of the nation. A power to make treaties of peace necessarily implies a power to decide the terms on which they shall be made; and foreign states could not deal safely with the government upon any other presumption. The power that is intrusted generally and largely with authority to make valid treaties of peace can, of course, bind the nation by alienation of part of its territory; and this is equally the case, whether that territory be already in the occupation of the enemy, or remains in the possession of the nation, and whether the property be public or private. (*a*) In the case of *The Schooner Peggy*, (*b*) the *Supreme Court of the *167
United States admitted, that individual rights, acquired by war, and vested rights of the citizens, might be sacrificed by treaty

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(*a*) Vattel, b. 1, c. 20, sec. 244; Ibid. c. 21, sec. 262; b. 4, c. 2, sec. 11, 12. Vattel admits, that the fundamental laws of a nation may withhold the power of alienation by treaty; and it would seem, by necessary inference, to be a violation of fundamental law, for the treaty-making power, acting under such an instrument as the Constitution of the United States, to agree by treaty for the abolition or alteration of any part of the Constitution. The stipulation would go to destroy the very authority for making the treaty.

(*b*) 1 Cranch, 103.

for national purposes. So, in the case of *Ware* v. *Hylton*, (*a*) it was said to be a clear principle of national law, that private rights might be sacrificed by treaty to secure the public safety, though the government would be bound to make compensation and indemnity to the individuals whose rights had thus been surrendered. The power to alienate, and the duty to make compensation, are both laid down by Grotius (*b*) in equally explicit terms.

A treaty of peace is valid and binding on the nation, if made with the present ruling power of the nation, or the government *de facto*. Other nations have no right to interfere with the domestic affairs of any particular nation, or to examine and judge of the title of the party in possession of the supreme authority. They are to look only to the fact of possession. (*c*) And it is an acknowledged rule of international law, that the principal party in whose name the war is made cannot justly make peace without including those defensive allies in the pacification who have afforded assistance, though they may not have acted as principals; for it would be faithless and cruel for the principal in the war to leave his weaker ally to the full force of the enemy's resentment. The ally is, however, to be no further a party to the stipulations and obligations of the treaty, than he has been willing to consent. All that the principal can require is, that his ally be considered as restored to a state of peace. Every alliance, in which all the parties are principals in the war, obliges the allies to treat in

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(*a*) Chase J., 3 Dallas, 199, 245.

(*b*) B. 3, c. 20, sec. 7. The government of the United States declared to the British government, in reference to the disputed line of the northeastern boundary of the United States, that it had no power to cede any part of the territory claimed by the State of Maine, without the consent of that State. See the letter of Lord Palmerston to Mr. Fox, the British Minister at Washington, November 19th, 1837. Though the better opinion would seem to be, that such a power of cession does reside exclusively in the treaty-making power, under the Constitution of the United States, yet sound discretion would forbid the exercise of it without the consent of the local governments who are interested, except in cases of great necessity, in which that consent might be presumed. By the treaty made between the United States and Great Britain, in 1842, respecting the disputed boundary line between the State of Maine and the British provinces of New Brunswick and Canada, part of the lands claimed by the State of Maine were, by the line agreed on, placed within the British territory, and ceded to Great Britain; yet the United States did not act on the subject until they had previously and very wisely provided, that commissioners on the part of the States of Massachusetts and Maine should be present at the negotiation, and assenting to the boundary line agreed on.

(*c*) Vattel, b. 4, c. 2, sec. 14, and *vide supra*, p. 24.

concert, though each one makes a separate treaty of peace for himself. (*d*)

* The effect of a treaty of peace is to put an end to the *168 war, and to abolish the subject of it. Peace relates to the war which it terminates. It is an agreement to waive all discussion concerning the respective rights of the parties, and to bury in oblivion all the original causes of the war. (*a*) It forbids the revival of the same war, by taking arms for the cause which at first kindled it, though it is no objection to any subsequent pretensions to the same thing on other foundations. (*b*) After peace, the revival of grievances arising before the war is not to be encouraged, for treaties of peace are intended to put an end to such complaints; and if grievances then existing are not brought forward at the time when peace is concluded, it is to be presumed that it is not intended to bring them forward at any future time. (*c*) Peace leaves the contracting parties without any right of committing hostility, for the very cause which kindled the war, or for what has passed in the course of it. It is, therefore, no longer permitted to take up arms again for the same cause. (*d*) But this will not preclude the right to complain and resist, if the same grievances which kindled the war be renewed and repeated, for that would furnish a new injury and a new cause of war equally just with the former war. If an abstract right be in question between the parties, the right, for instance, to impress at sea one's own subjects, from the merchant vessels of the other, and the parties make peace without taking any notice of the question, it follows, of course, that all past grievances, damages, and injury, arising under such claim, are thrown into oblivion, * by the amnesty which every treaty implies; but the claim *169 itself is not thereby settled, either one way or the other. It remains open for future discussion, because the treaty wanted an express concession or renunciation of the claim itself. (*a*)

A treaty of peace leaves everything in the state in which it finds

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(*d*) Vattel, b. 4, c. 2, sec. 16.

(*a*) Sir Wm. Scott, in the case of The Eliza Ann, 1 Dod. Adm. 249. Though private rights existing before the war may not be remitted by peace, the presumption is otherwise as to the rights of kings and nations. Grotius, b. 3, c. 20, sec. 19.

(*b*) Vattel, b. 4, c. 2, sec. 19.

(*c*) Sir Wm. Scott, The Molly, 1 Dod. Adm. 396.

(*d*) Vattel, b. 4, c. 2, sec. 19.

(*a*) Vattel, b. 4, c. 2, sec. 19, 20.

it, if there be no express stipulation on the subject. If nothing be said in the treaty of peace about the conquered country or places, they remain with the possessor, and his title cannot afterwards be called in question. (*b*) During war, the conqueror has only a usufructuary right to the territory he has subdued; and the latent right and title of the former sovereign continues, until a treaty of peace, by its silence, or by its express stipulation, shall have extinguished his title forever. (*c*)

The peace does not affect private rights which had no relation to the war. Debts existing prior to the war, and injuries committed prior to the war, but which made no part of the reasons for undertaking it, remain entire, and the remedies are revived. (*d*) There are certain cases in which even debts contracted, or injuries committed, between two subjects of the belligerent powers, during the war, are the ground of a valid claim, as in the case of ransom bills, and of contracts made by prisoners of war for subsistence, or in a trade carried on under a license. (*e*) This would be the case if the debt between them was contracted, or the injury was committed, in a neutral country. (*f*)

The time when treaties take effect.

A treaty of peace binds the contracting parties from the moment of its conclusion, and that is understood to be from * the day it is signed. (*a*)[1] A treaty made by the minister abroad, when ratified by his sovereign, relates back to the time of signing; (*b*) but like a truce, it cannot affect the subjects of the nation with guilt, by reason of acts of hostility subsequent to the date of the treaty, pro-

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(*b*) Vattel, b. 4, c. 2, sec. 19, 21.

(*c*) Sir William Scott, 1 Dod. Adm. 452; Vattel, b. 3, c. 13, sec. 197, 198; Ibid. b. 4, c. 2, sec. 1; Grotius, lib. 3, c. 6, sec. 4, 5; Mably's Droit de l'Europe, tom. i. c. 2, p. 144.

(*d*) Grotius, b. 3, c. 20, sec. 16, 18.

(*e*) Crawford *v.* The William Penn, 3 Wash. C. C. 484; 1 Peters C. C. 106, S. C.

(*f*) Vattel, b. 4, c. 2, sec. 22.

(*a*) Vattel, b. 4, c. 3, sec. 24; Martens's Summary, b. 8, c. 7, sec. 5; in the matter of Metzger, N. Y. Legal Observer for March, 1847.

(*b*) Lessee of Hylton *v.* Brown, 1 Wash. C. C. 312.

[1] So held in the United States *v.* Reynes, 9 How. U. S. 127; Davis *v.* The Police Jury, &c., 9 How. U. S. 280. Therefore, after the date of the treaty, an officer of the ceding power has no authority to grant land or franchises, to be enjoyed in the territory ceded. Sovereign power except for municipal purposes, ceases, unless otherwise provided, with the signing of the treaty.

vided they were committed before the treaty was known. All that can be required in such cases is, that the government make immediate restitution of things captured after the cessation of hostilities; and to guard against inconvenience from the want of due knowledge of the treaty, it is usual to fix the periods at which hostilities are to cease at different places, and for the restitution of property taken afterwards. (*c*)

But though individuals are not deemed criminal for continuing hostilities after the date of the peace, so long as they are ignorant of it, a more difficult question to determine is, whether they are responsible, *civiliter*, in such cases. Grotius (*d*) says, they are not liable to answer in damages, but it is the duty of the government to restore what has been captured and not destroyed.[2] In the case of the American ship *Mentos*, (*e*) which was taken and destroyed, off Delaware Bay, by British ships of war, in 1783, after the cessation of hostilities, but before that fact had come to the knowledge of either of the parties, the point was much discussed; and it was held, that the injured party could not pass over the person from whom the alleged injury had been received, and fix it on the commander of the English squadron on that station, who was totally ignorant of the whole transaction, and at the distance of thirty leagues from the place where it passed. There was no instance in the annals of the prize courts of such a remote and consequential responsibility in such a case. The actual wrongdoer is the person to answer in *judgment, and to him the responsibility, if any, is attached. He may have other persons responsible over to him, but the injured party could look only to him. The better opinion was, that though such an act be done through ignorance of the cessation of hostilities, yet mere ignorance of that fact would not protect the officer from civil responsibility in a prize court; and that if he acted through

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(*c*) Vattel, b. 4, c. 3, sec. 24, 25; Ibid. b. 2, c. 12, sec. 156, 157; Ibid. b. 3, c. 16; 2 Dallas, 40; Azuni, vol. ii. 227; Lessee of Hylton *v.* Brown, 1 Wash. C. C. 311, 312, 342, 351.

(*d*) B. 3, c. 21, sec. 5.

(*e*) 1 Rob. Adm. 179.

[2] It has been doubted whether the language of Grotius sanctions the limitation, or the reponsibility of the government, which is implied in the text. The original language is this: "*Quare si quid interea a subditis contra inducias factum sit, ipsi a pœnis immunes erunt, neque tamen eo minus contrahentes damnum resarcire debebunt.*"

ignorance, his own government must protect him and save him harmless. When a place or country is exempted from hostility by articles of peace, it is the duty of the government to use due diligence to give its subjects notice of the fact: and the government ought, in justice, to indemnify its subjects who act in ignorance of the peace. And yet it would seem from that case that the American owner was denied redress in the British admiralty, not only against the admiral of the fleet on that station, but against the immediate author of the injury. Sir William Scott denied the relief against the admiral; and ten years before that time relief had equally been denied by his predecessor against the person who did the injury. If that decision was erroneous, an appeal ought to have been prosecuted. We have, then, the decision of the English high court of admiralty, denying any relief in such a case, and an opinion of Sir William Scott many years afterwards, that the original wrong-doer was liable. The opinions cannot otherwise be reconciled, than upon the ground that the prize courts have a large and equitable discretion, in allowing or withholding relief, according to the special circumstances of the individual case; and that there is no fixed or inflexible general rule on the subject.

If a time be fixed by the treaty for hostilities to cease in a given place, and a capture be previously made, but with knowledge of the peace, it has been a question among the writers on public law, whether the captured property should be restored. The
* 172 better and the more reasonable opinion * is, that the capture would be null, though made before the day limited, provided the captor was previously informed of the peace; for, as Emerigon (*a*) observes, since constructive knowledge of the peace, after the time limited in different parts of the world, renders the capture void, much more ought actual knowledge of the peace to produce that effect. (*b*)

(*a*) Valin, Traité des Prises, c. 4, sec. 4 and 5; Emerigon, Traité des Ass. c. 12, sec. 19; Azuni on Maritime Law, edit. N. Y. vol. ii. p. 231.

(*b*) This point was extensively discussed in the French prize courts, in the case of the capture of the British ship Swineherd, by the French privateer Bellona, in 1801, and what was sufficient knowledge of the fact of the peace to annul the capture was the great question. The English ship was taken possession of, and carried into the Isle of France, and libelled, and condemned as lawful prize of war. The sentence of condemnation was affirmed in 1803, on appeal to the council of prizes at Paris, and M. Merlin has reported at large the elaborate argument and opinion of M. Collet

* Another question arose subsequent to the treaty of * 173
Ghent, of 1814, in one of the British vice-admiralty courts, on the validity of a recapture, by a British ship of war, of a British vessel captured by an American privateer. The capture made by an American cruiser was valid, being made before the period fixed for the cessation of hostilities, and in ignorance of the fact; but the prize had not been carried into port and condemned, and while at sea she was recaptured by the British cruiser after the period fixed for the cessation of hostilities, but without knowledge of the peace. It was decided that the possession of the vessel by the American privateer was a lawful possession, and that the British cruiser could not, after the peace, lawfully use force to devest this lawful possession. The restoration of peace put an end, from the time limited, to all force, and then the general principle applied, that things acquired in war remain, as to title and possession, precisely as they stood when the peace took place. The *uti possidetis* is the basis of every treaty of peace, unless it be otherwise agreed. Peace gives a final and perfect title to captures without condemnation; and as it forbids all force, it destroys all hopes of recovery as much as if the vessel was carried *infra præsidia*, and condemned. (*a*) A similar doctrine was held in the case of * *The Schooner Sophie*, (*a*) and a treaty of * 174
peace has the effect of quieting all titles of possession arising from the war, and of putting an end to the claim of all former proprietors to things of which possession was acquired by right of war.

If nothing be said to the contrary, things stipulated to be re-

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Descotils, the imperial advocate-general in the council of prizes, in favor of the captors. The ground he took, and upon which the council of prizes proceeded, was, that the king's proclamation of the signature of the preliminary articles of peace, though made known repeatedly to the French cruiser before the capture, but unaccompanied by any French attestation, was not that sufficient and indubitable evidence to the French cruiser of the fact of the peace, upon which he ought to have acted, and that the period of the five months had not elapsed, within which it was lawful, in the Indian seas, to continue hostilities. The learned and venerable author of that immense work, the Repertory of Jurisprudence, says, on introducing the case, that he shall be silent on the question, and contents himself with giving the discussions, and particularly the opinion of the advocate-general, and the reasons of the council of prizes. See Répertoire Universel et Raisonné de Jurisprudence, par M. le Compte Merlin, tom. xiii. tit. Prise Maritime, sec. 5.

(*a*) Case of The Legal Tender, Halifax, April, 1815, cited in Wheaton's Dig. 302.

(*a*) 6 Rob. Adm. 138.

stored are to be returned in the condition in which they were taken; but this does not relate to alterations which have been the natural consequence of time, and of the operations of war. A fortress or a town is to be restored in the condition it was when taken, so far as it shall still be in that condition when the peace is made. (*b*) There is no obligation to repair, as well as to restore, a dismantled fortress, or a ravaged territory. The peace extinguishes all claim for damages done in war, or arising from the operations of war. Things are to be restored in the condition in which the peace found them; and to dismantle a fortification, or to waste a country, after the conclusion of the peace, and previous to the surrender, would be an act of perfidy. (*c*)

Obligations of treaties.

Treaties of every kind, when made by the competent authority, are as obligatory upon nations as private contracts are binding upon individuals; and they are to receive a fair and liberal interpretation, according to the intention of the contracting parties, and to be kept with the most scrupulous good faith. Their meaning is to be ascertained by the same rules of construction and course of reasoning which we apply to the interpretation of private contracts. (*d*) If a treaty should, in
* 175 fact, be violated by one of the contracting * parties, either by proceedings incompatible with the particular nature of the treaty, or by an intentional breach of any of its articles, it rests alone with the injured party to pronounce it broken. The treaty, in such a case, is not absolutely void, but voidable, at the election of the injured party. (*a*) If he chooses not to come to a rupture, the treaty remains obligatory. He may waive or remit

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(*b*) Vattel, b. 4, c. 3, sec. 31, 34.

(*c*) Vattel, b. 4, c. 3, sec. 31.

(*d*) Grotius, b. 2, c. 16, sec. 1; Puff. b. 5, c. 12, sec. 1; Rutherforth's Institutes, b. 2, c. 7; Vattel, b. 2, c. 17; Eyre Ch. J., in 1 Bos. & Pull. 438, 439; Opinion of Sir James Marriott, cited in 1 Chitty Comm. Law, 44. But if the legislative and executive branches of the government have given and asserted a construction to a treaty with a foreign power, under which it claims dominion over a territory in its possession, the courts of justice will not set up or sustain a different construction. Foster *v.* Neilson, 2 Peters's U. S. Rep. 253. If a treaty be ambiguous in any part of it, the party who had the power, and on whom it was peculiarly incumbent to speak clearly and plainly, ought to submit to the construction most unfavorable to him, upon the reasonable maxim of the Roman Law, that *Pactionem obscuram iis nocere, in quorum fuit potestate legem apertius conscribere.* Vattel, b. 2, c. 17, sec. 264.

(*a*) Grotius, b. 2, c. 15, sec. 15; b. 3, c. 20, sec. 35–38; Burlamaqui, part 4, c. 14, sec. 8, p. 355; Vattel, b. 4, c. 4, sec. 54.

the infraction committed, or he may demand a just satisfaction.

There is a very material and important distinction made by the writers on public law, between a new war for some new cause, and a breach of a treaty of peace. In the former case, the rights acquired by the treaty subsist, notwithstanding the new war; but, in the latter case, they are annulled by the breach of the treaty of peace, on which they are founded. A new war may interrupt the exercise of the rights acquired by the former treaty, and, like other rights, they may be wrested from the party by the force of arms. But then they become newly acquired rights, and partake of the operation and result of the new war. To recommence a war by breach of the articles of a treaty of peace is deemed much more odious than to provoke a war by some new demand and aggression; for the latter is simply injustice, but in the former case, the party is guilty both of perfidy and injustice. (*b*) The violation of any one article of a treaty is a violation of the whole treaty; for all the articles are dependent on each other; and one is to be deemed a condition of the other; and a violation of any single article overthrows the whole treaty, if the injured party elects so to consider it. This may, however, be prevented, by an express provision, that if one article be broken, the others shall, nevertheless, continue in full force. (*c*) We have a strong instance, in * our own history, of the annihilation of *176 treaties by the act of the injured party. In 1798, the Congress of the United States (*a*) declared that the treaties with France were no longer obligatory on the United States, as they had been repeatedly violated on the part of the French government, and all just claims for reparation refused.

As a general rule, the obligations of treaties are dissipated by hostility, and they are extinguished and gone forever, unless revived by a subsequent treaty. But if a treaty contains any stipulations which contemplate a state of future war, and make provision for such an exigency, they preserve their force and obligation when the rupture takes place. All those duties of which the exercise is not necessarily suspended by the war, subsist in their full force. The obligation of keeping faith is so far

(*b*) Grotius, b. 3, c. 20, sec. 27, 28; Vattel, b. 4, c. 4, sec. 42.
(*c*) Grotius, b. 3, c. 19, sec. 14; Vattel, b. 4, c. 4, sec. 47, 48; b. 2, c. 13, sec. 202.
(*a*) Act of July 7th, 1798.

from ceasing in time of war, that its efficacy becomes increased, from the increased necessity of it. What would become of prisoners of war, and the terms of capitulation of garrisons and towns, if the word of an enemy was not to be relied on? The faith of promises and treaties which have reference to a state of war, is to be held as sacred in war as in peace, and among enemies as among friends. All the writers on public law admit this position, and they have never failed to recommend the duty and the observance of good faith, by the most powerful motives, and the most pathetic and eloquent appeals which could be addressed to the reason and to the moral sense of nations. (*b*) The tenth article of the treaty between the United States and Great Britain, in 1794, may be mentioned as an instance of a stipulation made for war. It provided, that debts due from individuals of the one nation to those of the other, and the shares or moneys which they might have in the public funds, or in public or private banks, should never, in any event of war, be sequestered or confiscated. There can be no doubt that the obligation of that article was not
* 177 impaired * by the war of 1812, but remained throughout that war, and continues to this day, binding upon the two nations, and will continue so, until they mutually agree to rescind the article; for it is a principle of universal jurisprudence, that a compact cannot be rescinded by one party only, if the other party does not consent to rescind it, and does no act to destroy it. In the case of *The Society for Propagating the Gospel* v. *New Haven*, (*a*) the Supreme Court of the United States would not admit the doctrine that treaties became extinguished *ipso facto* by war, unless revived by an express or implied renewal on the return of peace. Such a doctrine is not universally true. Where treaties contemplate a permanent arrangement of national rights, or which, by their terms, are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war. They revive at peace, unless waived, or new and repugnant stipulations be made. (*b*)

(*b*) Vattel, b. 3, c. 10, sec. 174; Grotius, b. 3, c. 25; Heinec. Jur. Nat. et Gent. b. 2, c. 9, p. 213.

(*a*) 8 Wheaton, 494; Sutton *v.* Sutton, 1 Russ. & My. R. 663, S. P.

(*b*) The American Ministers, in their negotiations at London, in 1818, with the British government, insisted that the 3d article of the treaty of September, 1783, *rela-*

With respect to the cession of places or territories by a treaty of peace, though the treaty operates from the making of it, it is a principle of public law, that the national character of the place agreed to be surrendered by treaty continues as it was under the character of the ceding country, until it be actually transferred. Full sovereignty cannot be held to have passed by the mere words of the treaty without actual delivery. To complete the right of property, the right to the thing and the possession of the thing must be united. This is a necessary principle in the law of property in all systems of jurisprudence. There must be both the *jus in rem* and the *jus in re*, according to the distinction of the civilians, and which Barbeyrac (*c*) says they borrowed from the canon law. This general law of property applies to the right of territory, no less than to other rights. * The practice of nations has been conformable to this principle, and the conventional law of nations is full of instances of this kind, and several of them were stated by Sir Wm. Scott, in the opinion which he gave in the case of *The Fama*. (*a*) 178 *

Cession of territory.

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tive to the fisheries, was a fundamental and permanent article, securing a primary right, not annulled, though the exercise of the right was interrupted by the war of 1812; and that the right remained in full force, after the termination of the war, notwithstanding it was not noticed in the treaty of Ghent. The British commissioners, on the other hand, alleged, that the war of 1812 cancelled the provision, and, not being renewed by the subsequent treaty of peace, the right was extinguished. The two nations at last agreed to the convention of the 20th of October, 1818, modifying and settling the question as to the fisheries, without yielding, on either side, their construction of the operation of the war of 1812, upon the treaty of 1783. Rush's Memoranda, pp. 354–368. See the Diplomatic Correspondence between Mr. Adams and Lord Bathurst, in 1815. In this correspondence, the British negotiator admitted that the *acknowledgment* of a right or title in a treaty of peace was, in its own nature, of perpetual obligation. The cession of a right, as that of boundary lines and places, for instance, would seem to fall within the same principle. Such were the treaties of Munster, 1648, and of Utrecht, 1713, which, after long and exhausting wars, settled the rights of the great European powers on a solid and permanent foundation, and are still deemed to be in vigor, and intimately connected with the settlement of Europe. See Roman Law by Lord Mackenzie, (ed. 1862,) 62, 63; Martens, Précis, Paris, 1858, t. i. p. 167, 181.

(*c*) Puff. par Barbeyrac, liv. iv. c. 9, sec. 8, note 2.

(*a*) 5 Rob. Adm. 106. It is a settled principle, in the law and usage of nations, that the inhabitants of a conquered territory change their allegiance, and their relation to their former sovereign is dissolved; but their relations to each other, and their rights of property, not taken from them by orders of the conqueror, remained undisturbed. The cession or conquest of a territory does not affect the rights of property. Vattel, b. 3, c. 13, sec. 200; The United States *v.* Percheman, 7 Peters U. S. 51; Mitchel *v.* The United States, 9 Peters U. S. 711; Strother *v.* Lucas, 12 Peters U. S.

The release of a territory from the dominion and sovereignty of the country, if that cession be the result of coercion or conquest,

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410, 438. The laws, usages, and municipal regulations in force at the time of the conquest or cession, remain in force, *until changed by the new sovereign.* Calvin's case, 7 Co. 17; Campbell *v.* Hall, Cowp. 209; 9 Peters U. S. 711, 734, 748, 749; Strother *v.* Lucas, 12 Peters U. S. 410. There is no doubt of the power of the sovereign to change the laws of a conquered or ceded country, unless restrained by the capitulation or treaty of cession. In the case of the Canal Appraisers *v.* The People, in 17 Wendell, 587, Chancellor Walworth declared, that in the case of a country acquired by conquest, no formal act of legislation is necessary to change the law; the mere will of the conqueror is sufficient. This is the case in governments where the conqueror is in possession of the legislative as well as the executive power; and until a nation or territory is wholly subdued, the conqueror is only entitled, by the usage of nations, to hold it as a temporary possession, by military occupation, until the final issue of the conquest is settled by treaty, or by the competent constitutional power. The principle of national law, as declared by the courts of the United States, is, that conquest does not give the conqueror *plenum dominium et utile.* A temporary right of possession and government is only acquired, unless the treaty of peace settles the question otherwise, or there be an absolute abandonment of the territory by the former sovereign, or an irretrievable subjection to the conqueror. United States *v.* Hayward, 2 Gallison, 486; Clark *v.* United States, 3 Wash. C. C. 104. The rule is different when a country is claimed by the right of discovery and occupancy, and not by right of conquest or cession. In the former case, the discoverers and new occupants carry with them all the general laws of the mother country applicable to their new situation as colonies, and they become, *ipso facto,* the law of the country. Such was the case with the United States, when they were first colonized by Great Britain; and this was the case, says Chancellor Walworth, with New York, when conquered from the Dutch in 1644; for the English held it, though acquired by conquest from the Dutch, not by that title merely, but by the prior right of discovery. But if he was in error on that point, yet, when the English acquired possession of New York by force, in 1664, the charter granted in that year to the Duke of York contained an explicit declaration of the king's will, that the laws of England should be the established laws of the province, and this put an end to the operation of the Roman Dutch laws imported from Holland. The illustrations above alluded to, of the sovereign power of the conqueror over the laws of the conquered countries, appears in the case of the northern barbarians who overran the south of Europe during the 5th and 6th centuries. They neither adopted their own laws entirely, nor retained those of the conquered countries to their full extent. The Roman provincials were governed between themselves, as to their possessions and personal rights, by the Roman law; the Salian Franks, by the Salic law; the Franks of the Rhine, by the Riparian law; the Alemans and Swabians, by the Alemanic law; and the Lombards, by their own law. (Savigny's Hist. of the Roman Law, vol. i. and see *infra,* vol. iii. 491.) So the Mahometan conquerors of Hindostan introduced their own law so far only as it affected the followers of Mahomet, leaving the conquered Hindoos to enjoy their own laws as between themselves. There is, therefore, now in India, one law for Europeans and their descendants, another for the Hindoos, and another for the Mahometans; and these different laws have been adopted in India by the will of the English sovereign, without any parliamentary authority. The conquest of Gibraltar, Trinidad, Ceylon, the Cape of Good Hope, Louisiana, &c., all show that the old laws remain, or

does not impose any obligation upon the government to indemnify those who may suffer a loss of property by the cession. The annals of New York furnish a strong illustration of this position. The territory composing the State of Vermont belonged to this State; and it separated from it, and erected itself into an independent State, without the consent, and against the will, of the government of New York. The latter continued for many years to object to the separation, and to discover the strongest disposition to reclaim by force the allegiance of the inhabitants of that State. But they were unable to do it; and it was a case of a revolution effected by force, analogous to that which was then in action between this country and Great Britain. And when New York found itself under the necessity of acknowledging the independence of Vermont, a question arose before the legislature, whether they were bound in duty to make compensation to individual citizens whose property would be sacrificed by the event, because their titles to land lying within the jurisdiction of Vermont, and derived from New York, would be disregarded by the government of that State. The claimants were heard at the bar of the house of assembly, by counsel, in 1787, and it was contended on their behalf, that the State was bound, upon the principles of the social compact, to protect and defend the rights and property of all its members; and that whenever it became necessary, upon grounds of public expediency and policy, to withdraw the protection of government * from the property of any of * 179 its citizens, without actually making the utmost efforts to reclaim the jurisdiction of the country, the State was bound to make compensation for the loss. In answer to this argument, it

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the laws of the conquering nation, in whole or in part, are substituted, at the mere will and pleasure of the conqueror.[1]

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[1] The integrity of the rights of the inhabitants in a ceded territory was firmly maintained in the cases of Louisiana and California. Soulard *v.* United States, 4 Peters U. S. 511; Delassus *v.* United States, 9 Peters U. S. 117; Smith *v.* United States, 10 Peters U. S. 313; Teschemaker *v.* Thompson, 18 Cal. 11.

The doctrine of the California cases is, that upon the cession of that territory, such of the interests, rights, and property of the Mexican government as were essential to the political status of California as a new State of the Union were held by the United States in trust for the new State. The sovereign right to the precious metals existing in the soil vested absolutely in the United States. Moore *v.* Smaw, and Fremont *v.* Flower, 17 Cal. 199.

was stated that the independence of Vermont was an act of force beyond the power of this State to control, and equivalent to a conquest of that territory, and the State had not the competent ability to recover, by force of arms, their sovereignty over it, and it would have been folly and ruin to have attempted it. All pacific means had been tried without success; and as the State was compelled to yield to a case of necessity, it had discharged its duty; and it was not required, upon any of the doctrines of public law, or principles of political or moral obligation, to indemnify the sufferers. The cases in which compensation had been made for losses consequent upon revolutions in government were peculiar and gratuitous, and rested entirely on benevolence, and were given from motives of policy, or as a reward for extraordinary acts of loyalty and exertion. No government can be supposed to be able, consistently with the welfare of the whole community, and it is, therefore, not required to assume the burden of losses produced by conquest, or the violent dismemberment of the State. It would be incompatible with the fundamental principles of the social compact.

This was the doctrine which prevailed; and when the act of July 14, 1789, was passed, authorizing commissioners to declare the consent of the State to the independence of Vermont, it was expressly declared, that the Act was not to be construed to give any person claiming lands in Vermont, under title from this State, any right to any compensation whatsoever from New York.

LECTURE IX.

OF OFFENCES AGAINST THE LAW OF NATIONS.

The violation of a treaty of peace, or other national compact, is a violation of the law of nations, for it is a breach of public faith. (*a*) Nor is it to be understood that the law of nations is a code of mere elementary speculation, without any efficient sanction. It has a real and propitious influence on the fortunes of the human race. It is a code of present, active, durable, and binding obligation. As its great fundamental principles are founded in the maxims of eternal truth, in the immutable law of moral obligation, and in the suggestions of an enlightened public interest, they maintain a steady influence, notwithstanding the occasional violence by which that influence may be disturbed. The law of nations is placed under the protection of public opinion. It is enforced by the censures of the press, and by the moral influences of those great masters of public law, who are consulted by all nations as oracles of wisdom; and who have attained, by the mere force of written reason, the majestic character, and almost the authority, of universal lawgivers, controlling by their writings the conduct of rulers, and laying down precepts for the government of mankind. No nation can violate public law, without being subjected to the penal consequence of reproach and disgrace, and without incurring the hazard of punishment, to be inflicted in open and solemn war by the injured party. The law of
* nations is likewise enforced by the sanctions of municipal *182
law. It is, says Blackstone, (*a*) adopted in its full extent by the common law of England; and whenever any question arises which is properly the subject of its jurisdiction, it is held to be a part of the law of the land. The offences which fall more immediately under its cognizance, and which are the most obvious, the most extensive, and most injurious in their effects, are the violations of safe-conduct, infringements of the rights of ambassa-

(*a*) Vattel, b. 2, c. 15, sec. 221; Resolution of Congress of November 23d, 1781.
(*a*) Comm. vol. iv. 67.

dors, and piracy. To these we may add the slave-trade, which may now be considered, not, indeed, as a piratical trade, absolutely unlawful by the law of nations, but as a trade condemned by the general principles of justice and humanity, openly professed and declared by the powers of Europe.

Violation of passports.

(1.) A safe-conduct or passport contains a pledge of the public faith, that it shall be duly respected, and the observance of this duty is essential to the character of the government which grants it. The statute law of the United States has provided, in furtherance of the general sanction of public law, that if any person shall violate any safe-conduct or passport, granted under the authority of the United States, he shall, on conviction, be imprisoned not exceeding three years, and fined at the discretion of the court. (*b*)

Of ambassadors.

(2.) The same punishment is inflicted upon those persons who infringe the law of nations, by offering violence to the persons of ambassadors and other public ministers, or by being concerned in prosecuting or arresting them or their domestic servants. (*c*)[1] This is an offence highly injurious to a free and liberal communication between different governments, and mischievous in its consequences to the dignity and well-being of the nation. It tends to provoke the resentment of the sovereign whom the ambassador represents, and to bring upon the state the calamities of war. The English parliament, under an impression of the danger to the community from violation of the rights of embassy, and urged by the spur of a particular occasion, carried the provisions of the statute of 7 Anne, c. 12, to a dangerous ex-
*183 tent. That statute prostrated all the *safeguards to life, liberty, and property, which the wisdom of the English common law had established. It declared, that any person convicted of suing out or executing civil process, upon an ambassador, or his domestic servants, by the oath of the party, or of one witness, before the lord chancellor and the two chief justices, or any two of them, might have such penalties and corporal punishment

(*b*) Act of Congress, April 30th, 1790, sec. 27. A foreign minister (and an attaché to a foreign legation is such) cannot waive his privilege, for it belongs to his sovereign who sends him. U. S. *v.* Benner, 1 Bald. C. C. 234.

(*c*) Act, *sup.* sec. 25, 26.

[1] Vattel, Law of Nations, book iv. c. 8, 9.

inflicted upon him as the judges should think fit. The preamble to the statute contains a special and inflamed recital of the breach of the law of nations which produced it, by the arrest of the Russian Minister in the streets of London.

The Congress of the United States, during the time of the American war, discovered great solicitude to maintain inviolate the obligations of the law of nations, and to have infractions of it punished in the only way that was then lawful, by the exercise of the authority of the legislatures of the several States. They recommended to the States to provide expeditious, exemplary, and adequate punishment for the violation of safe-conducts or passports granted under the authority of Congress, to the subjects of a foreign power in time of war; and for the commission of acts of hostility against persons in amity or league with the United States; and for the infractions of treaties and conventions to which the United States were a party; and for infractions of immunities of ambassadors, and other public ministers. (*a*)

(3.) Piracy is robbery, or a forcible depredation on the high seas, without lawful authority, and done *animo furandi*, and in the spirit and intention of universal hostility. It is the same offence at sea with robbery on land; and all the writers on the law of nations, and on the maritime law of Europe, agree in this definition of piracy. (*b*) Pirates have been regarded, by all civilized nations, as the enemies of the human race, and the most atrocious violators of the universal * law of * 184 society. (*a*) They are everywhere pursued and punished with death, and the severity with which the law has animadverted upon this crime arises from its enormity and danger, the cruelty that accompanies it, the necessity of checking it, the difficulty of detection, and the facility with which robberies may be committed upon pacific traders in the solitude of the ocean. Every nation has a right to attack and exterminate them without any declaration of war; for though pirates may form a loose and temporary association among themselves, and re-establish in some degree those laws of justice which they have violated with the rest of the world, (*b*) yet they are not considered as a national body, or en-

Piracy.

(*a*) Journals of Congress, vol. vii. 181.
(*b*) The United States *v.* Smith, 5 Wheaton, 153, and note, Ibid. 163.
(*a*) Cic. in Verrem, lib. 5; 3 Inst. 113.
(*b*) Cic. de Off. 2, 11.

titled to the laws of war, as one of the community of nations. They acquire no rights by conquest; and the law of nations, and the municipal law of every country, authorize the true owner to reclaim his property taken by pirates, wherever it can be found; and they do not recognize any title to be derived from an act of piracy. The principle, that *a piratis et latronibus capta dominium non mutant*, is the received opinion of ancient civilians and modern writers on general jurisprudence; and the same doctrine was maintained in the English courts of common law, prior to the great modern improvements made in the science of the law of nations. (*c*)

By the Constitution of the United States, Congress is authorized to define and punish piracies and felonies committed on the high seas, and offences against the law of nations. In pursuance of this authority, it was declared, by the act of Congress of
*185 April 30th, 1790, c. 9, sec. 8, that murder or *robbery, committed on the high seas, or in any river, haven, or bay, out of the jurisdiction of any particular State, or any other offence which, if committed within the body of a county, would, by the laws of the United States, be punishable with death, should be adjudged to be piracy and felony, and punishable with death. It was further declared, that if any captain or mariner should piratically and feloniously run away with any vessel, or any goods or merchandise to the value of fifty dollars; or should yield up any such vessel voluntarily to pirates; or if any seaman should forcibly endeavor to hinder his commander from defending the ship or goods committed to his trust, or should make a revolt in the ship; every such offender should be adjudged a pirate and felon, and be punishable with death. (*a*) Accessaries to such piracies before the fact are punishable in like manner, but accessaries after the fact are only punishable by fine and imprisonment. And, by the act of March 3d, 1819, c. 76, sec. 5, Congress declared, that if any person on the high seas should commit the crime of *piracy as defined by the law of nations*, he should, on con-

(*c*) Bynk. Q. J. Pub. b. 1, c. 17; Rutherforth, b. 2, c. 9; Azuni, vol. ii. pp. 351, 361, 362, edit. N. Y.; Cro. Eliz. 685; Anon. 2 Woodd. lec. 429. Property found on board a pirate ship goes to the crown, of strict right, as droits of the admiralty; but the claim of the original owner is admitted upon equitable principles, on due application. The Helen, 1 Hagg. Adm. 142.

(*a*) By the act of Congress of March 3d, 1835, c. 313, the offence of making a revolt in a ship is no longer punishable as a capital offence, but only by fine and imprisonment at hard labor.

viction, suffer death. This act was but temporary in its limitation, and has expired; but it was again declared, and essentially to the same effect, by the act of Congress of 15th May, 1820, c. 113, sec. 3, that if any person, upon the high seas, or in any open roadstead, or bay, or river, where the sea ebbs and flows, commits the crime of robbery in and upon any vessel, or the lading thereof, or the crew, he shall be adjudged a pirate. So, if any person engaged in any piratical enterprise, or belonging to the crew of any piratical vessel, should land and commit robbery on shore, such an offender shall also be adjudged a pirate. The statute, in this respect, seems to be only declaratory of the law of nations; and upon the doctrine of the case of *Lindo* v. *Rodney*, (*b*) such plunder and robbery ashore, by the crew, and with the aid of vessels, is a marine case, and of admiralty jurisdiction. The statute further declared, that the above provision was not to be construed to deprive any particular state of its jurisdiction over such offences when committed within the body of a county, or to authorize the courts of the United States to try any such offenders, after conviction or acquittance, for the same offence, in a State court.

* Under these legislative provisions, it has been made a *186 question, whether it was sufficient to refer to the law of nations for a definition of piracy, without giving the crime a precise definition in terms. The point was settled in the case of *The United States* v. *Smith*; (*a*) and it was there held not to be necessary to give by statute a more logical enumeration in detail of all the facts constituting the offence, and that Congress might as well define it by using a term of a known and determined meaning, as by expressly mentioning all the particulars included in that term. The crime of piracy was defined by the law of nations with reasonable certainty, and it does not depend upon the particular provisions of any municipal code for its definition and punishment. Robbery on the high seas is, therefore, piracy by the act of Congress, as well as by the law of nations. (*b*)

(*b*) Doug. 613, note.

(*a*) 5 Wheaton, 153.

(*b*) In the case of United States *v.* Brig Malek Adhel, 2 How. U. S. 210, it was held, after an elaborate discussion, that an act was *piratical* in the view of the law of Congress of March 3d, 1819, c. 200, if the act or acts done be hostile in their character, and wanton and criminal in their commission, without any lawful sanction, whether committed for purposes of plunder, or for purposes of hatred, revenge, or a wanton abuse of power, or a lawless appetite for mischief. They are piratical aggressions in

There can be no doubt of the right of Congress to pass laws punishing pirates, though they may be foreigners, and may have committed no particular offence against the United States. It is of no importance, for the purpose of giving jurisdiction, on *whom* or *where* a piratical offence has been committed. A pirate, who is one by the law of nations, may be tried and punished in any country where he may be found, for he is reputed to be out of the protection of all laws and privileges. (*c*) The statute of any government may declare an offence committed on board its own vessels to be piracy, and such an offence will be punishable exclusively by the nation which passes the statute. But piracy, under the law of nations, is an offence against all nations, and punishable by all. In the case of *The United States* v. *Palmer*, (*d*) it was held, that the act of Congress of 1790 was intended to punish offences against the United States, and not offences against the human race; and that the crime of robbery, committed by a person who was not a citizen of the United States, on the
* 187 high seas, on board of a ship belonging * exclusively to subjects of a foreign state, was not piracy under the act, and was not punishable in the courts of the United States. The offence, in such a case, must, therefore, be left to be punished by the nation under whose flag the vessel sailed, and within whose particular jurisdiction all on board the vessel were. This decision was according to the law and practice of nations; for it is a clear and settled principle, that the jurisdiction of every nation extends to its own citizens, on board of its own public and private vessels at sea. (*a*) The case applied only to the fact of robbery committed at sea, on board of a foreign vessel, at the time belonging exclusively to subjects of a foreign state; and it was not intended

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the sense of the law of nations and of the act of Congress, and work a forfeiture of the *ship*, whether the owner be or be not innocent. He is, in that case, bound by the acts of the master. But the *cargo* presents a different consideration, and it is not to be forfeited under the act of Congress or the law of nations, except in cases of extraordinary turpitude and violence. In ordinary torts and injuries the law admits of a compensation in damages. If, however, the owner of the cargo co-operates in the piratical acts, the penalty of confiscation is also inflicted on the cargo as well as on the ship. The more strict rule is also enforced in the case of belligerent rights, and the cargo follows the fate of the ship.

(*c*) Bynk. Q. J. Pub. b. 1, c. 17; Sir Leoline Jenkins's Works, vol. i. 714.

(*d*) 3 Wheaton, 610; United States *v.* Kessler, 1 Bald. C. C. 15, S. P.

(*a*) Rutherforth's Inst. b. 2, c. 9; Mr. Jefferson's Letter to M. Genet, June 17th, 793, *supra*, p. 26.

to decide, that the same offence, committed on board of a vessel not belonging to the subject of any foreign power, was not piracy. The same court afterwards, in the case of *The United States* v. *Klintock*, (*b*) admitted that murder or robbery, committed on the high seas, by persons on board of a vessel not at the time belonging to the subjects of any foreign power, but in possession of a crew acting in defiance of all law, and acknowledging obedience to no government or flag whatsoever, fell within the purview of the act of Congress, and was punishable in the courts of the United States. Persons of that description were pirates, and proper objects for the penal code of all nations. The act of Congress did not apply to offences committed against the particular sovereignty of a foreign power; or to murder or robbery committed in a vessel, belonging at the time, in fact, as well as in right, to the subject of a foreign state, and, in virtue of such property, subject at the time to its control. But it applied to offences committed against all nations, by persons who, by common consent, were equally amenable to the laws of all nations. * It * 188 was further held, in the case of *The United States* v. *Pirates*, (*a*) and in the case of *The United States* v. *Holmes*, (*b*) in pursuance of the same principle, that the moment a vessel assumed a piratical character, and was taken from her officers, and proceeded on a piratical cruise, she lost all claim to national character, and the crew, whether citizens or foreigners, were equally punishable, under the act of Congress, for acts of piracy; and it would be immaterial what was the national character of the vessel before she assumed a piratical character. Piracy is an offence within the criminal jurisdiction of all nations. It is against all and punished by all; and the plea of *autrefois acquit*, resting on a prosecution instituted in the courts of any civilized state, would be a good plea in any other civilized state. As the act of Congress of 1790 declares every offence committed at sea to be piracy, which would be punishable with death if committed on land, it may be considered as enlarging the definition of piracy, so as not only to include every offence which is piracy by the law of nations and the act of Congress of 1819, but other offences which were not piracy, until made so by statute.

(*b*) 5 Wheaton, 144.
(*a*) Ibid. 184.
(*b*) Ibid. 412.

An alien, under the sanction of a national commission, cannot commit piracy while he pursues his authority. His acts may be hostile, and his nation responsible for them. They may amount to a lawful cause of war, but they are never to be regarded as piracy. (*c*) The Barbary powers, notwithstanding some doubts which formerly existed, are now, and for a century past have been, regarded as lawful powers, and not pirates. They have all the *insignia* of regular, independent governments, and are competent to maintain the European relations of peace and war. Cicero, and, after him, Grotius, define a regular enemy to be a power which hath the elements or constituents of a nation, such
*189 * as a government, a code of laws, a national treasury, the consent and agreement of the citizens, and which pays a regard to treaties of peace and alliance; (*a*) and all these things, says Bynkershoek, (*b*) are to be found among the states of Barbary. In some respects their laws of war have retained the barbarity of the Middle Ages, for they levy tribute or contributions on all such Christian powers as are not able to protect their commerce by force; and they also make slaves of their prisoners, and require a heavy ransom for their redemption. But this, Bynkershoek insists, is conformable to the strict laws of war; and the nations of Europe who carried on war with the Barbary states, such as Spain, Naples, Holland, &c., have heretofore exercised the same rule of ancient warfare, upon the principle of retaliation. When Lord Exmouth, in 1816, attacked Algiers, and compelled

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(*c*) Martens's Essay on Privateers, translated by Horne, p. 42; Manning's Comm. pp. 112, 113. States generally prohibit their subjects from taking letters of marque from a foreign power, without the permission of their sovereign; and treaties are numerous in which the contracting parties stipulate, that if the subjects of either party take letters of marque from the enemies of the other, they shall be treated as pirates.

(*a*) Cic. Philip. 4, c. 6; Grotius, b. 3, c. 3, sec. 1.

(*b*) Q. J. Pub. b. 1, c. 17. A STATE, in the meaning of public law, is a complete or self-sufficient body of persons, united together in one community, for the defence of their rights, and to do right to foreigners. A state has its affairs and interests; it deliberates, and becomes a moral person, having an understanding and will, and is susceptible of obligations and laws. Grotius, b. 1, c. 1, sec. 14; Ibid. b. 3, c. 3, sec. 2; Burlamaqui, vol. ii. part 1, c. 4, sec. 9; Vattel, b. 1, c. 1. *Respublica est cœtus multitudinis, Juris consensu et utilitatis communione sociatus.* Cic. de Repub. lib. 1, sec. 25. *The State* is founded on the relations of right. Protection is its aim and object, and that protection is but another word for justice, or the obtaining and granting to every one his due. La Justice constituée, c'est l'état. Cousin; Lieber's Political Ethics, vol. i.

the Dey to terms of peace, he compelled him also to stipulate, that, in the event of future wars with any European power, no Christian prisoners of war should be consigned to slavery, but they should be treated with all humanity as prisoners of war, until regularly exchanged, according to the European practice: and at the termination of hostilities, the prisoners should be restored without ransom. By that treaty of peace upwards of 1,000 prisoners belonging to Italy, Spain, Portugal, Holland, and Greece were released from galling slavery, and in which part of them had subsisted for thirty-five years. This stipulation *in *190 favor of general humanity deserves some portion of that exalted eulogy bestowed by Montesquieu (*a*) on the treaty made by Gelon, king of Syracuse, with the Carthaginians. It would have been still more worthy of a comparison, if it had not left color for the construction, that the renunciation, by the Dey of Algiers, of the practice of condemning Christian prisoners of war to slavery, was to be confined to the "event of future wars with any European power"; and if a great Christian power on this side of the Atlantic, whose presence and whose trade are constantly seen and felt in the Mediterranean had not seemed to have been entirely forgotten. (*b*)

But notwithstanding Bynkershoek had insisted, near a century ago, that captures by the Barbary powers worked a change of property by the laws of war, in like manner as captures made by regular powers, yet, in a case in the English admiralty so late as 1801, (*c*) it was contended that the capture and sale of an English ship by Algerines, was an invalid and unlawful conversion of the property, on the ground of being a piratical seizure. It was, however, decided that the African states had long acquired the character of established governments, and that though their notions of justice differ from those entertained by the Christian powers, their public acts could not be called in question; and a derivative title founded on an Algerine capture, and matured by a confiscation *in their way*, was good against the original owner. In the time of Richard I., when the laws of Oleron were compiled, all infidels were, by that code, (*d*) regarded as pirates, and their property

(*a*) Esprit des Lois, b. 10, c. 5.

(*b*) Declaration of the Dey of Algiers, made with Lord Exmouth August 26th, 1816. Annual Register for 1816, app. to Chronicle, p. 288.

(*c*) The Helena, 4 Rob. Adm. 3. (*d*) Sec. 45.

liable to seizure wherever found. It was a notion, at that time, that such persons could not have any fellowship or communion with Christians.

*191 * In a case which occurred in 1675, Sir Leoline Jenkins held, that the commander of a privateer regularly commissioned, was liable to be treated as a pirate, if he exceeded the bounds of his commission. Bynkershoek justly opposes this dangerous opinion; (*a*) and the true rule undoubtedly is, that the vessel must have lost its national, and assumed a piratical character, before jurisdiction over it, to that extent, could be exercised.

If a natural-born subject was to take prizes belonging to his native country, in pursuance of a foreign commission, he would, on general principles, be protected by his commission from the charge of piracy. But to prevent the mischief of such conduct, the United States have followed the provisions of the English statute of 11 & 12 Wm. III. c. 7, and the general practice of other nations, (*b*) and have, by the act of Congress of April 30, 1790, sec. 9, declared, that if any citizen should commit any act of hostility against the United States, or any citizen thereof, upon the high seas, under color of any commission from any foreign prince or state, or on pretence of authority from any person, such offender shall be adjudged to be a pirate, felon, and robber, and, on being thereof convicted, shall suffer death. The act of Congress not only authorizes a capture, but a condemnation in the courts of the United States, for all piratical aggressions by foreign vessels; and whatever may be the responsibility incurred by the nation to foreign powers, in executing such laws, there can be no doubt that courts of justice are bound to obey and administer them. All such hostile and criminal aggressions on the high seas, under the flag of any power, render property taken *in delicto* subject to confiscation by the law of nations. (*c*)

(4.) The African slave-trade is an offence against the municipal laws of most nations in Europe, and it is declared to be piracy by the statute laws of England and the

Slave-trade.

*192 * United States. Whether it is to be considered as an offence against the law of nations, independent of compact, has been a grave question, much litigated in the courts charged

(*a*) Q. J. Pub. b. 1, c. 17.

(*b*) See *supra*, p. 100.

(*c*) Story J., 11 Wheaton, 39 – 41.

with the administration of public law; and it will be useful to take a short view of the progress and present state of the sense and practice of nations on this subject.

Personal slavery, arising out of forcible captivity, has existed in every age of the world, and among the most refined and civilized people. The possession of persons so acquired has been invested with the character of property. Captives in war were sold as slaves by Greek and Roman commanders. The slave-trade was a regular branch of commerce among the ancients; and a great object of Athenian traffic with the Greek settlements on the Euxine, was procuring slaves from the barbarians for the Greek market. (*a*) In modern times, treaties have been framed, and national monopolies sought, to facilitate and extend commerce in this species of property. (*b*) It has been interwoven in the municipal institutions of all the European colonies in America, and with the approbation and sanction of the parent states. It forms to this day the foundation of large masses of property in the southern parts of the United States. But, for half a century past, the African slave-trade began to awaken a spirit of remorse and sympathy in the breasts of men, and a conviction that the traffic was repugnant to the principles of Christian duty, and the maxims of justice and humanity.

Montesquieu, who has disclosed so many admirable truths and

(*a*) Mitford's Hist. vol. iv. p. 236. Cattle and slaves constituted the principal riches of the early ages of Greece. The Byzantines, says Polybius, (General History, b. 4, c. 5,) supplied, from the Pontus, the Greeks with honey, wax, salted meats, leather, *and great numbers of very serviceable slaves.* It is mentioned in Scripture, that the Tyrians traded with the Caucasian provinces for slaves: "Javan, Tubal, and Meshech traded the persons of men and vessels of brass in thy market"; Ezek. xxvii. 13; and that they stole the children of the Jews, and sold them as slaves to the Greeks. Joel iii. 6. So the Carthaginians exchanged black slaves from the interior of Africa, in their commerce and barter with the cities of Italy and Greece. The great extent of the slave-trade, which was carried on by the polished nations of antiquity settled on the coasts of the Mediterranean, with Central Africa, by means of caravans, appears from Heeren, in his Historical Researches, vol. i., on the land trade of the Carthaginians.

(*b*) By the Assiento Treaty of March 26th, 1713, between Great Britain and Spain, the latter power granted to the English South Sea Company, for thirty years, the right of supplying the Spanish colonies in America with negro slaves, at the rate of 4,800 annually. This Assiento contract was explained and confirmed by a convention between England and Spain, in May, 1716. A similar contract had been previously agreed on by Spain with the Royal Guinea Company settled in France. Jenkins's Collection of Treaties, London, 1775, vol. i. 375, vol. ii. 179.

so much profound reflection, in his Spirit of Laws, not only condemned all slavery as useless and unjust, but he animadverted upon the African slave-trade by the most pungent reproaches. It was impossible, he observed, that we could admit the negroes to be human beings, because if we were once to admit them to
*193 be men, we should *soon come to believe that we ourselves were not Christians. Why has it not, says he, entered into the heads of European princes who make so many useless conventions, to make one general stipulation in favor of humanity? (*a*) We shall see presently that this suggestion was, in some degree, carried into practice by a modern European congress.

The Constitution of the United States laid the foundation of a series of provisions, to put a final stop to the progress of this great moral pestilence, by admitting a power in Congress to prohibit the importation of slaves *after* the expiration of the year 1807. The Constitution evidently looked forward to the year 1808 as the commencement of an epoch in the history of human improvement. Prior to that time Congress did all on this subject that it was within their competence to do. (*b*) By the acts of March 22d, 1794, and May 10th, 1800, the citizens of the United States, and residents within them, were prohibited from engaging in the transportation of slaves from the United States to any foreign place or country, or from one foreign country or place to another, for the purpose of traffic.[1] These provisions prohibited our citizens from all concern in the slave-trade, with the exception of direct importation into the United States; and the most prompt and early steps were taken, within the limits of the Constitution, to interdict also that part of the traffic. By the act of 2d March, 1807, it was pro-

(*a*) L'Esprit des Lois, liv. 15, c. 5.

(*b*) The Continental Congress, which assembled at Philadelphia in 1774, gave the first general and authoritative condemnation of the slave-trade, by the resolution not to import or purchase any slave imported after the first day of December, in that year, and wholly to discontinue the trade. Journals of Congress, vol. i. p. 32. The convention of delegates of the people of Virginia, and the provincial congress of North Carolina, had anticipated this measure; for in August preceding they resolved to discontinue the importation of slaves. Pitkin's History, vol. i. App. note 16; Jones's Defence of the Revolutionary History of North Carolina, p. 145.

[1] A ship which is employed in the service of slavers is engaged in the transportation of slaves, within the meaning of the act of 1800, though no slaves are taken on board. The Porpoise, 2 Curtis C. C. 307; see, too, United States *v.* Schooner Catharine, 2 Paine C. C. 721.

hibited, under severe penalties, to import slaves into the United States after the 1st January, 1808; and, on the 20th April, *1818,[1] the penalties and punishments were increased, and *194 the prohibition extended not only to importation, but generally against any citizens of the United States being concerned in the slave-trade. It has been decided, (*a*) that these statute prohibitions extend as well to carrying slaves on freight, as to cases where they were the property of American citizens, and to carrying them from one port to another of the same foreign empire, as well as from one foreign country to another. The object was to prevent, on the part of our citizens, all concern whatever in such a trade.

The act of March 3d, 1819, went a step further, and authorized national armed vessels to be sent to the coast of Africa to stop the slave-trade so far as citizens or residents of the United States were engaged in that trade; and their vessels and effects were made liable to seizure and confiscation. The act of 15th May, 1820, (*b*) went still further, and declared, that if any citizen of the United States, being of the crew of any foreign vessel engaged in the slave-trade, or any person whatever, being of the crew of any vessel owned in whole or in part, or navigated for or on behalf of any citizen of the United States, should land on any foreign shore, and seize any negro or mulatto, not held to service or labor by the laws of either of the States or Territories of the United States, with intent to make him a slave; or should decoy, or forcibly bring or receive such person on board such vessel with like intent; or should forcibly confine or detain on board any negro or mulatto, not lawfully held to service, with intent to make him a slave; or should, on board any such vessel, offer to sell as a slave any negro or mulatto, not held to service as aforesaid; or should, on the high seas, or on any tide water, transfer or deliver over, to any other vessel, any such negro or mulatto, with intent to make him a slave, or should deliver on shore, from on board any such vessel, any negro

(*a*) The Merino, 9 Wheaton, 391. The declarations of the master connected with his acts in furtherance of the voyage, have been held to be evidence on an indictment against the owner of the ship, under the act of 20th April, 1818. United States *v.* Gooding, 12 Wheaton, 460.

(*b*) C. 113, sec. 4, 5.

[1] The Ohio, 1 Newberry Adm. 409.

or mulatto, with like intent, such citizen or person should be adjudged a pirate, and, on conviction, should suffer death.[2]

It is to be observed, that the statute operates only where our municipal jurisdiction might be applied, consistenly with the general theory of public law, to the persons of our citizens, or to foreigners on board of American vessels. Declaring the crime
*195 piracy does not make it so, within the *purview of the law of nations, if it were not so without the statute; and the legislature intended to legislate only where they had a right to legislate, over their own citizens and vessels. The question, notwithstanding these expressions in the statute, still remained to be discussed and settled, whether the African slave-trade could be adjudged piracy, or any other crime, within the contemplation of the code of international law. It has been attempted, by negotiation between this country and Great Britain, to agree that both nations should consider the slave-trade piratical; but the convention for that purpose between the two nations has not as yet been ratified, though the British nation have carried their statute denunciation of the trade as far as the law of the United States. (*a*)

(*a*) All these acts of Congress apply exclusively to external commerce in slaves. The *internal* commerce within the United States in slaves is left to the control and discretion of the State governments; and the Northern States, which have abolished slavery, admit of no internal commerce in slaves within their respective States. It is not so in the slaveholding States. Some of them permit a traffic in slaves as between citizens of different States; but in Maryland, as early as 1796, it was declared by law to be unlawful to import or bring into the State, by land or water, any slave for sale or to reside within the State; and every slave brought in contrary to the statute was declared to be free. And in the constitution of Mississippi of 1833, the introduction of slaves into the State as merchandise, or for sale, was prohibited, though actual settlers were allowed until 1845 to purchase slaves from any State in the Union, and bring them into that State for their individual use.[1]

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[2] As to what acts and participation will warrant a conviction under this act, see the case of the United States *v.* Libby, 1 Wood. & Minot, 221, where the subject is discussed by Mr. Justice Woodbury. See also United States *v.* Battiste, 2 Sumner, 240. In the case of The United States *v.* Corrie, Judge Magrath, the learned U. S. District Judge for the District of South Carolina, in an able and luminous argument, held, that the act of 1820 is not any part of the laws of the United States passed for the suppression of the slave-trade, but relates to the specific offences which it enumerates, and that these specific offences have not been and are not to be confounded with the slave-trade, and that the slave-trade is not declared piracy by this act. See the Opinion published in pamphlet form at Charleston in 1860.

[1] By an act to suppress the slave-trade in the District of Columbia, passed Sept. 20, 1850, it is made unlawful to bring any slave within the District for the purpose of being

The first British statute that declared the slave-trade unlawful was in March, 1807. (*b*) This was a great triumph of British justice. It was called for by the sense of the nation, which had become deeply convinced of the impolicy and injustice of the slave-trade; and by the subsequent statute of 51 Geo. III. the trade was declared to be contrary to the principles of justice, humanity, and sound policy; and lastly, by the act of Parliament of 31st March, 1824, the trade is declared to be piracy. (*c*) England is thus, equally with the United States, honestly and zealously engaged in promoting the universal abolition of the trade, and in holding out to the world her sense of its extreme criminality. Almost every maritime nation in Europe has deliberately and solemnly, either by legislative acts, or by treaties and other formal engagements, acknowledged the injustice and inhumanity of the trade, and pledged itself to promote its abolition. By the treaty of Paris of the 30th May, 1814, between Great Britain and France, Louis XVIII. agreed that the traffic was repugnant to the principles of natural justice, and he engaged to unite his efforts at the ensuing congress, to induce all the powers of Christendom * to *196 decree the abolition of the trade, and that it should cease definitively, on the part of the French government, in the course of five years. The ministers of the eight principal European powers, who met in congress at Vienna, on the 8th February, 1815, solemnly declared, in the face of Europe and the world, that the African slave-trade had been regarded, by just and enlightened men, in all ages, as repugnant to the principles of humanity and of universal morality, and that the public voice in all civilized countries demanded that it should be suppressed; and that the universal abolition of it was conformable to the spirit of the age and the generous principles of the allied powers. In March, 1815, the

(*b*) Stat. 47 Geo. III. Denmark abolished, in 1792, the foreign slave-trade, and the importation of slaves into her colonies, though the prohibitions were not to take effect until 1804. Wheaton's Inquiry into the Right of Search, 1842.

(*c*) Stat. 5 Geo. IV. c. 113. The statute of 3 and 4 Wm. IV. c. 73, for the extinction of slavery, has some new and important penal provisions respecting the dealing in slaves on the high seas, or any traffic in them; and the statute of 1 Vict. c. 91, as well as the preceding statute, repeated the declaration, that British subjects concerned in the slave-trade should be adjudged pirates, and punishable accordingly.

sold; and slaves so brought in become free. And by act of Congress April 16, 1862, ch. 54, § 1, slavery in the District of Columbia was abolished. And by act of Congress July 2, 1864, ch. 210, § 9, the coastwise slave-trade is forever prohibited.

Emperor Napoleon decreed that the slave-trade should be abolished; but this effort of ephemeral power was afterwards held to be null and void, as being the act of an usurper; and in July following, Louis XVIII. gave directions that this odious and wicked traffic should from that present time cease. The first French decree, however, that was made public, abolishing the trade, was of the date of the 8th January, 1817, and that was only a partial and modified decree. (*a*) In December, 1817, the Spanish government

(*a*) By the convention between Great Britain and France, of the 30th November, 1841, the mutual right of search was allowed on board the vessels of each of the two nations, within certain specified waters, i. e. along the western coast of Africa from Cape Verd, or 15 deg. N. Lat. to 10 degrees S. of the equator, — all around the island of Madagascar to the extent of 20 leagues from the island, — to the same distance from the coasts of Brazil, and from the coasts of the islands of Cuba and Porto Rico. The right of searching merchant vessels to be confined to ships of war, under special authority from each of the two governments, and never to be exercised upon the ships of war of either nation. The United States have refused to become a party to any convention authorizing the mutual right of search, and France afterwards refused to ratify the treaty of 1841, conceding the mutual right of search. *Vide supra*, p. 153. The efforts and the failure of the efforts to sanction the mutual right of search, in respect to the slave-trade, form an instructive item in modern diplomatic history. In 1818, the British government proposed to France the mutual right of search of merchant vessels on the high seas, with a view to the more effectual suppression of the slave-trade, and which had been conceded by Spain, Portugal, and the Netherlands. The proposition was at the same time made to the United States, and rejected by both powers. In November of that year, the British government proposed to the Congress of the five great powers, at Aix-la-Chapelle, the following propositions: (1.) The mutual right of search of merchant vessels engaged in the slave-trade; (2.) The declaration that the slave-trade was piracy, under the law of nations. Both propositions were rejected on the part of France, Austria, Prussia, and Russia. The propositions were renewed at the Congress at Verona, in 1822, but without success. Afterwards, in 1841, the mutual right of search was conceded by the northern European powers, parties to the Quintuple Treaty, as see *supra*, p. 153. Though the government of the United States has uniformly objected to the admission of the right of visitation and search, in time of peace, even in respect to the African slave-trade, yet they agreed, in furtherance of efficient measures for its suppression, by the treaty of Washington, in 1842, with Great Britain, that each party should "prepare, equip, and maintain in service, on the coast of Africa, a sufficient and adequate squadron, or naval force of vessels, of suitable numbers and descriptions, to carry, in all, not less than eighty guns, to enforce, separately and respectively, the laws, rights, and obligations of each of the two countries, for the suppression of the slave-trade, — the said squadrons to be independent of each other; but the two governments stipulating, nevertheless, to give such orders to the officers commanding their respective forces as shall enable them most effectually to act in concert and co-operation, upon mutual considerations, as exigencies may arise."[1]

[1] The treaty between the United States and Great Britain of April 7, 1862, for the suppression of the slave-trade establishes a mutual right of search, under carefully

prohibited the purchase of slaves on any part of the coast of Africa, after the 31st of May, 1820; and this was in pursuance of the treaty between Great Britain and Spain of the 23d September, 1817, made for the abolition of the slave-trade immediately north of the equator, and entirely after 1820. In January, 1818, the Portuguese government made the like prohibition as to the purchase of slaves on any part of the coast of Africa north of the equator. In 1821, there was not a flag of any European state which could *legally* cover this traffic, to the north of the equator; and yet, in 1825, the importation of slaves covertly continued, if it was not openly countenanced, from the Rio de la Plata to the Amazon, and through the whole American Archipelago. (*b*)

(*b*) Report of a Committee of the House of Representatives of the United States, February 16th, 1825. See, also, the Quarterly Review, No. 68 and No. 89, pp. 243–246; Alison's History of Europe, vol. vi. pp. 128, 129, and the English parliamentary discussions and documents. It appears that the African slave-trade was carried on to an enormous extent down to the year 1839. The trade was principally between Africa, and Brazil and Cuba. In 1828, 45,000 African slaves were imported into the city of Rio Janeiro. But by a convention between England and Brazil, in 1826, it was made piratical for the subjects of Brazil to be engaged in the trade after the year 1830; and it is understood that the government of Brazil, in 1831, not only put a stop by law to the importation of slaves, but declared that all slaves thereafter imported should be free, and imposed a heavy assessment on the importers, and provided for the transportation of such negroes back to Africa. In the treaty concluded 10th September, 1822, between Great Britain and the Imaun of Muscat, the latter agreed to abolish the foreign slave-trade forever in his dominions. So, by the treaty of the 23d of October, 1817, between Great Britain and Radama, king of Madagascar, it was agreed that there should be, throughout all the dominions of the king of Madagascar, an entire cessation of the sale or transfer of slaves. And in the treaty of commerce and navigation between Great Britain and the United Provinces of Rio de la Plata, February 2d, 1825, it was agreed by the latter to prohibit all persons subject to its jurisdiction, by the most solemn laws, from taking any share in the slave-trade; and yet it was stated by high authority in the British parliament, May, 1838, as a matter of fact, and agreed to afterwards in an address to the Queen, that notwithstanding all the efforts of Great Britain to put down the slave-trade, it still continued, little diminished in extent, and much aggravated in horror. Portugal was the principal offender. What was once a legal had become now a contraband traffic. She had systematically and grossly violated her treaty engagements on that subject. Since 1829, there had been 153 Portuguese vessels seized as slavers, containing upwards of 163,000 slaves, and Portugal had, since that period, transported a million of slaves. This enormous abuse induced England, in 1839, to authorize by law the forcible examination and search of vessels suspected to be concerned in that trade. The British Minister, Sir Robert Peel, stated in the House of Commons, in July, 1844, that Spain and Brazil

guarded regulations, intended on the one hand to maintain the national sovereignty uninvaded, and on the other to insure the effectual extinction of the traffic in slaves.

*197 *The case of *The Amedie* (*a*) was the earliest decision in English courts on the great question touching the legality of the slave-trade, on general principles of international law. That was the case of an American vessel, employed in carrying slaves from the coast of Africa to a Spanish colony. She was captured by an English cruiser, and the vessel and cargo were condemned to the captors, in a vice-admiralty court in the West Indies, and, on appeal to the Court of Appeals in England, the judgment was affirmed. Sir Wm. Grant, who pronounced the opinion of the court, observed that the slave-trade, being abolished by both England and the United States, the court was authorized to assert, that the trade, abstractly speaking, could not have a legitimate existence, and was, *prima facie*, illegal upon principles of universal law. The claimant, to entitle him to restitution, must show affirmatively a right of property under the municipal laws of his own country; for, if it be unprotected by his own municipal law, he can have no right of property in human beings carried as his slaves, for such a claim is contrary to the principles of justice and humanity. *The Fortuna*, (*b*) was condemned on the authority of *The Amedie*, and the same opinion was again affirmed. But in *198 the subsequent *case of *The Diana*, (*a*) the doctrine was not carried so far by Lord Stowell, as to hold the trade itself to be piracy, or a crime against the law of nations. A Swedish vessel was taken by a British cruiser on the coast of Africa, engaged in carrying slaves from Africa to a Swedish island in the West Indies, and she was restored to the owner, on the ground that Sweden had not then prohibited the trade, and had tolerated it in practice. England had abolished the trade as unjust and criminal, but she claimed no right of enforcing that prohibition against the subjects of those states which had not adopted the same

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were the two powers chargeable with the whole responsibility of the continuance of the slave-trade, and that the island of Cuba was in a precarious, if not a perilous position, from the settled determination of her black population to emancipate themselves; and it is stated, on strong authority, that the English effort to put down the slave-trade by an armed force of British cruisers on the coast of Africa has increased the horrors of the slave-trade, without materially diminishing its amount. See Hill's Narrative of Fifty Days on Board a Slave-Ship, Sir F. Buxton on African Slave-Trade, and the other documents referred to and discussed in Westminster Review for June, 1844, p. 446, &c.

(*a*) 1 Acton Adm. 240.

(*b*) 1 Dod. Adm. 81.

(*a*) 1 Dod. Adm. 95.

opinion; and England did not mean to set herself up as the legislator, and *custos morum*, for the whole world, or presume to interfere with the commercial regulations of other states. The principle of the case of *The Amedie* was, that where the municipal law of the country to which the parties belonged had prohibited the trade, English tribunals would hold it to be illegal, upon general principles of justice and humanity, but they would respect the property of persons engaged in it under the sanction of the laws of their own country.

The doctrine of these cases is, that the slave-trade, abstractly speaking, is immoral and unjust, and it is illegal, when declared so by treaty or municipal law; but that it is not piratical or illegal by the common law of nations, because, if it were so, every claim founded on the trade would at once be rejected everywhere and in every court, on that ground alone.[1]

The whole subject underwent further, and a most full, elaborate, and profound discussion, in the case of the *Le Louis*. (*b*) A French vessel, owned and documented as a French vessel, was captured by a British armed force on the coast of Africa, after resistance made to a demand to visit and search. She was carried into Sierra Leone, and condemned by a court of vice-admiralty, for being concerned * in the slave-trade, contrary to the * 199 French law. On appeal to the British high court of admiralty, the question respecting the legality of the capture and condemnation was argued, and it was judicially decided, that the right of visitation and search, on the high seas, did not exist in time of peace. If it belonged to one nation, it equally belonged to all, and would lead to gigantic mischief, and universal war. Other nations had refused to accede to the English proposal of a reciprocal right of search in the African seas, and it would require an express convention to give the right of search in time of peace. The slave-trade, though unjust, and condemned by the statute law of England, was not piracy, nor was it a crime by the universal law of nations. To make it piracy, or such a crime, it must have been so considered and treated in practice by all civilized states, or made so by virtue of a general convention.

(*b*) 2 Dod. Adm. 210.

[1] Buron *v.* Denman, 2 Wels., H. & Gor. 167.

On the contrary, it had been carried on by all nations, even by Great Britain herself, until within a few years, and was then carried on by Spain and Portugal, and not absolutely prohibited by France. It was, therefore, not a criminal traffic by the law of nations; and every nation, independent of treaty, retained a legal right to carry it on. No one nation had a right to force the way to the liberation of Africa, by trampling on the independence of other states; or to procure an eminent good by means that were unlawful; or to press forward to a great principle, by breaking through other great principles that stood in the way. The condemnation of the French vessel at Sierra Leone was, therefore, reversed; and the penalties imposed by the French law (if any there were) were left to be enforced, not in an English, but in a French court.

The same subject was brought into discussion in the K. B. in 1820, in *Madrazo* v. *Willes*. (*a*) The court held, that the British statutes against the slave-trade were only appli-
* 200 cable * to British subjects, and only rendered the slave-trade unlawful when carried on by them. The British parliament could not prevent the subjects of other states from carrying on the trade out of the limits of the British dominions. If a ship be acting contrary to the general law of nations, she is thereby subject to condemnation; but it is impossible to say that the slave-trade was contrary to the law of nations. It was, until lately, carried on by all the nations of Europe; and a practice so sanctioned can only be rendered illegal, on the principles of international law, by the consent of all the powers. Many states had so consented, but others had not, and the cases had gone no further than to establish the rule, that ships belonging to countries that had prohibited the trade were liable to capture and condemnation, if found engaged in it.

The final decision of the question in this country has been the same as in the case of the *Le Louis*. In the case of the *La Jeune Eugénie*, (*a*) it was decided, in the Circuit Court of the United States, in Massachusetts, after a masterly discussion, that the slave-trade was prohibited by universal law. But subsequently, in the case of *The Antelope*, (*b*) the Supreme Court of the United States declared that the slave-trade, though contrary to the law

(*a*) 3 B. & Ald. 353.
(*b*) 10 Wheaton, 66.
(*a*) 2 Mason, 409.

of nature, had been sanctioned, in modern times, by the laws of all nations who possessed distant colonies; and a trade could not be considered as contrary to the law of nations which had been authorized and protected by the usages and laws of all commercial nations. It was not piracy, except so far as it was made so by the treaties or statutes of the nation to which the party belonged. It might still be lawfully carried on by the subjects of those nations who had not prohibited it by municipal acts or treaties. (*c*)

(*c*) The doctrine in the case of The Antelope, and in the English cases therein referred to, is, that right of bringing in for adjudication, in time of peace, foreign vessels engaged in the slave-trade, and captured on the high seas for that cause, did not exist; and vessels so captured would be restored, unless the trade was also unlawful, and prohibited by the country to which the vessel belonged; and if a claim be put in for Africans as slaves and property, the *onus probandi* is thrown upon the claimant to make specific proof of the individual proprietary interest according to the laws of the country to which the vessel belongs.

PART II.

OF THE GOVERNMENT AND CONSTITUTIONAL JURISPRUDENCE OF THE UNITED STATES.

LECTURE X.

OF THE HISTORY OF THE AMERICAN UNION.

The government of the United States was erected by the free voice and joint will of the people of America, for their common defence and general welfare. Its powers apply to those great interests which relate to this country in its national capacity, and which depend for their stability and protection on the consolidation of the Union. It is clothed with the principal attributes of political sovereignty, and it is justly deemed the guardian of our best rights, the source of our highest civil and political duties, and the sure means of national greatness. The constitution and jurisprudence of the United States deserve the most accurate examination; and an historical view of the rise and progress of the Union, and of the establishment of the present constitution, as the necessary fruit of it, will tend to show the genius and value of the government, and prepare the mind of the student for an investigation of its powers.

The association of the American people into one body politic took place while they were colonies of the British empire, * 202 and owed allegiance to the British crown. That * the union of this country was essential to its safety, its prosperity, and its greatness had been generally known, and frequently avowed, long before the late revolution, or the claims of the British parliament which produced it. The people of the New England colonies were very early in the habit of confederating together for their common defence. As

Confederacy of the New England colonies.

their origin and their interests were the same, and their manners, their religion, their laws, and their civil institutions exceedingly similar, they were naturally led to a very intimate connection, and were governed by the same wants and wishes, the same sympathies and spirit. The colonies of Massachusetts, Plymouth, Connecticut, and New Haven, as early as 1643, under the impression of danger from the surrounding tribes of Indians, and for protection against the claims and encroachments of their Dutch neighbors, entered into a league, offensive and defensive, which they declared should be firm and perpetual, and be distinguished by the name of the United Colonies of New England. By their articles of confederation, each colony was to have exclusive jurisdiction within its own territory; and in every war, offensive and defensive, each of the confederates was to furnish its quota of men and money in a ratio to its population; and a congress of two commissioners, delegated from each colony, was to be held annually, with power to deliberate and decide on all affairs of war and peace, and on all points of common concern; and every determination, in which three fourths in number of the assembly concurred, was to be binding upon the whole confederacy. (*a*)

This association may be considered as the foundation of a series of efforts for a more extensive and more perfect union of the colonies. It contained some provident and *jealous provi- *203
sions, calculated to give security and stability to the whole. It provided that no two colonies were to join in jurisdiction, without the consent of all; and it required the like unanimous consent to admit any other colony into the confederacy; and if any one member violated any article of it, or any way injured another colony, the commissioners of the other colonies were to take cognizance of the matter, and determine upon it. In this transaction, and under the authority of this union, the New England colonies acted, in fact, as independent states, and free from the control of any superior power, because the civil war in which England was then involved occupied the whole attention of the

(*a*) Hazard's State Papers, 496, 583, 590; Hutchinson's History of Massachusetts, vol. i. pp. 124, 126; Robertson's Posthumous History of America, b. 10, pp. 191, 192; Winthrop's Hist. of New England, by Savage, vol. ii. p. 101; Baylies's Historical Memoir, vol. ii. p. 118; Trumbull's Hist. of Connecticut, vol. i. p. 124; Plymouth Colony Laws, App. p. 308, edit. 1836.

mother country; and this first step towards a future independence was suffered to pass without much notice, and without any animadversion. The confederacy subsisted, with some alterations, for upwards of forty years, and for part of that time, with the countenance of the government in England. It was not dissolved until the year 1686, when the charters of the New England colonies were in effect vacated by a commission from King James II. (*a*)

Congress of 1754.

The people of this country, after the dissolution of this earliest league, continued to afford other instructive precedents of association for their safety. A congress of governors and commissioners from other colonies, as well as from New England, was occasionally held, to make arrangements for the more effectual protection of our interior frontier, and we have an instance of one of these assemblies at Albany, in 1722. (*b*) But a much more interesting congress was held there in the year 1754. It consisted of commissioners from New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, Pennsylvania, and Maryland, and was called at the instance of the lords commissioners for trade and the plantations, to take into consideration the best means of defending America, in case of war with France, which was then impending. The object of the English
* 204 * administration in calling this convention was in reference to treaties of friendship with the Indian tribes; but the colonies had more enlarged views; and the commissioners who met in congress, and who enrolled among their number some of the most distinguished names in our colonial history, asserted and promulgated several invaluable truths, the proper reception of which, in the minds of their countrymen, prepared the way for their future independence, and our present greatness. One of the colonies (Massachusetts) expressly instructed her delegates to enter into articles of union and confederation with the other colonies, for their general security in peace as well as in war. The convention unanimously resolved, that a union of the colonies was absolutely necessary for their preservation. They rejected all proposals for a division of the colonies into separate confederacies, and proposed a plan of federal government, consisting of a general council of delegates, to be triennially chosen by the provincial

(*a*) Hutchinson's History of Massachusetts, vol. i. p. 126, note.
(*b*) Smith's History of New York, vol. i. p. 171.

assemblies, and a president-general, to be appointed by the crown. In this council was vested, subject to the immediate negative of the president, and the eventual negative of the king in council, the rights of war and peace, in respect to the Indian nations; and the confederacy was to embrace all the then existing colonies, from New Hampshire to Georgia. The council were to have authority to make laws for the government of new settlements, upon territories to be purchased from the Indians, and to raise troops and build forts, and even to equip vessels of force, to guard the coast and protect trade, as well on the ocean as upon the lakes and rivers. They were likewise to make laws, and lay and levy general duties, imposts, and taxes, for those necessary purposes. (*a*) But the times were * not yet ripe, nor the minds * 205 of men sufficiently enlarged, for such a comprehensive proposition: and this bold project of a continental union had the singular fate of being rejected, not only on the part of the crown, but by every provincial assembly. It was probably supposed, on the one hand, that the operation of the union would teach the colonies the secret of their own strength, and the proper means to give it activity and direction; while, on the other, the colonies were jealous of the preponderating influence of the royal prerogative. We were destined to remain, for some years longer, separate, and, in a considerable degree, alien commonwealths, emulous of each other in obedience to the parent state, and in devotion to her interests; but jealous of each other's prosperity, and divided by policy, institutions, prejudice, and manners. So strong was the force of these considerations, and so exasperated were the people of the colonies in their disputes with each other concerning boundaries and charter claims, that Doctor Franklin (who was one of the commissioners to the congress that formed the plan of union in 1754) observed, in the year 1760, that a union of the colonies against the mother country was absolutely impossible, or at least without being forced by the most grievous tyranny and oppression. (*a*)

(*a*) Franklin's Works, edited by Sparks, vol. iii. pp. 22 – 55; Smith's History of New York, vol. ii. pp. 219 – 225; Marshall's Life of Washington, vol. i. note 8; Massachusetts Historical Collections, vol. vii. pp. 203 – 214.

(*a*) Franklin's Works, edited by Sparks, vol. iv. p. 42. Governor Pownal, in his work on The Administration of the Colonies, (the 4th edition of which appeared in 1768,) declared that the colonies had no one principle of association amongst them, and

The great value of a federate union of the colonies had, however, sunk deep into the minds of men. The subject was familiar to our colonial ancestors. They had been in the habit, especially in seasons of danger and difficulty, of forming associations, more or less extensive. The necessity of union had been felt, its advantages perceived, its principles explained, the way to it pointed out, and the people of this country were led by the force of irresistible motives * to resort to the same means of defence and security, when they considered that their liberties were in danger, not from the vexatious and irregular warfare of the Indian tribes, but from the formidable claims, and still more formidable power of the parent state. The assertion by the British parliament of an unqualified right of binding the colonies in all cases whatsoever, and specifically of the right of taxing them without their consent, and the denial by the colonies of the right of taxation without representation, and the attempt of the king and parliament to enforce it by the power of the sword, were the immediate causes of the American revolution. Soon after the first unfriendly attempt upon our chartered privileges, by the statute for raising a revenue in the colonies by means of a stamp duty, a congress of delegates from nine colonies was assembled at New York in October, 1765, upon the recommendation of Massachusetts, and they digested a bill of rights, in which the sole power of taxation was declared to reside in their own colonial legislatures. (*a*) This was preparatory to a more exten-

Congress of 1765.

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that their manner of settlement, diversity of charters, conflicting interests, and mutual rivalship and jealousies, would render a union impracticable! pp. 35, 36, 93.

(*a*) 2 Belknap's N. H. p. 326; Journals of the Assembly of the Colony of N. Y., October, 1765; Marshall's Life of Washington, vol. ii. App. No. 5; Pitkin's Political and Civil History of the United States, vol. i. pp. 178–186, App. No. 7, 8, 9. A full and apparently very authentic "Journal of the Continental Congress of 1765" was published at New York by E. Winchester, 1845, being found among the papers of Cæsar Rodney, one of the delegates to the Convention of 1765, and first mentioned in Niles's National Register, in 1812. It was a precursor, in point of ability, intelligence, and spirit, of the proceedings of the Continental Congress of 1774. The 6th and 7th chapters of the first volume of Mr. Pitkin's History contain a clear, authentic, and very interesting detail of the resolutions and acts of the British parliament, relating to America, subsequently to the peace of 1763; of the proceedings of the British government to enforce them; and of the spirit of opposition and resistance which they met with on the part of the colonies. The resistance kept pace with the parliamentary impositions, and was constantly growing in strength, activity, and determined purpose, until it was consummated by the permanent union of the colonies in 1774.

sive and general association of the colonies, which took place in September, 1774, and laid the foundations of our independence and permanent glory. The more serious claims of the British parliament, and the impending oppressions of the British crown at this last critical period, induced the twelve colonies, which * were spread over this vast continent, from * 207 Nova Scotia to Georgia, to an interchange of opinions and views, and to unite in sending delegates to Philadelphia, "with authority and direction to meet and consult together for the common welfare." In pursuance of their authority, this first Continental Congress, whose names and proceedings are still familiar to the present age, and will live in the gratitude of a distant posterity, took into consideration the afflicted state of their country; asserted, by a number of declaratory resolutions, what they deemed to be the unalienable rights of English freemen; pointed out to their constituents the system of violence which was preparing against those rights; and bound them by the most sacred of all ties, the ties of honor and of their country, to renounce commerce with Great Britain, as being the most salutary means to avert the one and to secure the blessings of the other. (*a*) These * resolutions received prompt and universal obedience, and * 208 the Union, being thus auspiciously formed, it was continued by a succession of delegates in Congress; and through every period of the war, and through every revolution of our government, this Union has been revered and cherished, as the guardian of our peace, and the only solid foundation of national independence.

Congress of 1774.

(*a*) The most material of those declaratory resolutions was the one which stated, that, as the colonies were not, and could not properly be represented in the British parliament, they were entitled "to a free and exclusive power of legislation in their several provincial legislatures, in all cases of taxation and internal polity, subject only to the negative of their sovereign." The colonies from the earliest periods of the settlement of the country, with the exception of Pennsylvania, whose charter recognized the force of such laws, had generally claimed, under their charters, an exemption from the operation of the British navigation acts, and of their system of commercial monopoly; and they had, by all indirect means short of open resistance, evaded the force of those laws, and assumed the right to a free trade. (1 Hutch. Hist. 322.) But the Congress of 1774, in the spirit of conciliation, renounced every such pretension, and declared, that "from the necessity of the case, and in regard to the mutual interests of both countries, they cheerfully consented to the operation of such acts of the British parliament as were *bona fide* restrained to the regulation of their external commerce, for the purpose of securing the commercial advantages of the whole empire to the mother country, and the commercial benefits of its respective members; *excluding every*

In May, 1775, a Congress again assembled at Philadelphia, and was clothed with ample discretionary powers. The delegates were chosen, as those of the preceding Congress had been, partly by the popular branch of the colonial legislatures when in session, but principally by conventions of the people in the several colonies. (*a*) They were instructed to "concert, agree upon, direct, order, and prosecute" such measures as they should deem most fit and proper, to obtain redress of American grievances, or, in more general terms, they were to take care of the liberties of the country. (*b*)

Soon after this meeting, Georgia acceded to and completed the confederacy of the thirteen colonies. Hostilities had already commenced in the province of Massachusetts, and the claim of the British parliament to an unconditional and unlimited sovereignty over the colonies was to be asserted by an appeal to arms. The Continental Congress, charged with the protection of the rights and interests of the people of the united colonies, and instructed with the power, and sustained by the zeal and confidence of their constituents, prepared for resistance. They published a declaration of the causes and necessity of taking up arms, and proceeded immediately to levy and organize an army, to prescribe rules for the government of their land and naval forces, to contract debts, and emit a paper currency upon the faith of the Union; and gradually assuming all the powers of national sovereignty, they at last, on the 4th day of July, 1776, took a separate and equal station among the nations of the earth, by declaring the united colonies to be free and independent states.

Declaration of independence.

This memorable declaration, in imitation of that published by the United Netherlands on a similar occasion, *209 recapitulated * the oppressions of the British king, asserted it to be the natural right of every people to withdraw from tyranny, and with the dignity and the fortitude of conscious rectitude, it contained a solemn appeal to mankind in vindication of the necessity of the measure. By this declaration, made "in the name, and by the authority of the people," the colonies were absolved from all allegiance to the British crown,

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idea of taxation, internal or external, for raising a revenue on the subjects in America, without their consent." Journals of Congress, vol. i.

(*a*) Journals of Congress, of May, 1775, pp. 69–74.

(*b*) Journals of Congress, of May, 1775, vol. i. p. 74.

and all political connection between them and Great Britain was totally dissolved. The principle of self-preservation, and the right of every community to freedom and happiness, gave a sanction to this separation. When the government established over any people becomes incompetent to fulfil its purpose, or destructive to the essential ends for which it was instituted, it is the right of that people, founded on the law of nature and the reason of mankind, and supported by the soundest authority, and some very illustrious precedents, to throw off such government, and provide new guards for their future security. This right is the more apparent, and the duty of exercising it becomes the more clear and unequivocal, in the case of colonies which are situated at a great distance from the mother country, and which cannot be governed by it without vexatious and continually increasing inconvenience; and when they have arrived at maturity in strength and resources, or, in the language of Montesquieu, which he applied to our very case, "when they have grown great nations in the forest they were sent to inhabit." If, in addition to these intrinsic causes, gradually and powerfully tending to a separation, the parent state should think fit, in the arrogance of power and superiority, to deny to her colonies the equal blessings of her own free government, and should put forth a claim to an unlimited control, in her own discretion, over all their rights, and the whole administration of their affairs, the consequence would then be almost inevitable, that the colonists would rise and repel the claim; and more certainly would this be the case, if
* they were a spirited and intelligent race of men, true to * 210
themselves, and just to their posterity.

The general opinion in favor of the importance and value of the union appears evident in all the proceedings of Congress; and as early as the declaration of independence, it was thought expedient, for its security and duration, to define with precision, and by a formal instrument, the nature of our compact, the powers of Congress, and the residuary sovereignty of the states. On the 11th of June, 1776, Congress undertook to digest and prepare articles of confederation. But the business was attended with much embarrassment and delay, and, notwithstanding these states were then surrounded by the same imminent dangers, and were contending for the same illustrious prize, it was not until the 15th of November, 1777, that Congress

Articles of confederation.

could so far unite the discordant interests and prejudices of thirteen distinct communities as to agree to the articles of confederation. And when those articles were submitted to the state legislatures for their perusal and ratification, they were declared to be the result of impending necessity, and of a disposition for conciliation, and that they were agreed to, not for their intrinsic excellence, but as the best system which could be adapted to the circumstances of all, and, at the same time, afford any tolerable prospect of general assent. (*a*)

These celebrated articles met with still greater obstacles in their progress through the states. Most of the legislatures ratified them with a promptitude which showed their sense of the necessity of the confederacy, and of the indulgence of a liberal spirit of accommodation. But Delaware did not accede to them until the year 1779, and Maryland explicitly rejected them. (*b*) She instructed her delegates to withhold their assent to the articles, until there was an amendment, or additional agreement, to appropriate the uncultivated and unpatented lands
* 211 in the western part of the Union, as a common * fund to defray the expenses of the war. (*a*) These lands were claimed by the states within whose asserted limits and jurisdiction they were situated, and several of them, from a deep sense of the importance of the union, agreed to an unconditional ratification of the articles, or, in other words, to a separate confederacy between the states so ratifying the same, though Maryland, or other states, should withhold their approbation and sanction. (*b*) The legislature of New York, by their acts of 23d of October, 1779, and 19th of February, 1780, even consented to a release of the unsettled lands in the western part of the state, for the use and benefit of such of the United States as should become members of the federal alliance; and to resign the jurisdiction as well as the right of pre-emption over her waste and uncultivated territory. The refusal of Maryland, so long persisted in,

(*a*) Journals of Congress, vol. iii. The instructions given to the delegates to the Continental Congress by the several colonial congresses, conventions, and assemblies, in 1776, and prior to the declaration of independence, contained an express reservation, to each colony of the sole and exclusive regulation of its own internal government, police, and concerns.

(*b*) Ibid. vii.

(*a*) Journals of Congress, vol. v. p. 208.

(*b*) Ibid. vol. v.

gave encouragement to the enemy, and injured the common cause, and damped the hopes of the friends of America at home and abroad. These considerations at last induced that state to make a generous sacrifice of her pretensions; and on the 1st of March, 1781, and which was upwards of three years from their first promulgation, the articles of confederation received the unanimous approbation of the United States.

The difficulties which impeded the framing and adopting the articles of confederation, even during the pressure of a common calamity, and which nothing at last but a sense of common danger could surmount, form a striking example of the mighty force of local interests and discordant passions, and they teach a monitory lesson of moderation to political councils.

Notwithstanding the articles of confederation conferred upon Congress (though in a very imperfect manner, and under a most unskilful organization) the chief rights of political supremacy, the *jura summi imperii*, by which * our existence * 212 as an independent people was bound up together, and known and acknowledged by the nations of the world, yet they were, in fact, but a digest, and even a limitation, in the shape of written compact, of those undefined and discretionary sovereign powers which were delegated by the people of the colonies to Congress, in 1775, and which had been freely exercised and implicitly obeyed. (*a*) A remarkable instance of the exercise of this original, dormant, and vast discretion appears on the journals of Congress, the latter end of the year 1776. The progress

(*a*) The government of the Union is considered to have been revolutionary in its nature, from its first institution by the people of the colonies, in 1774, down to the final ratification of the articles of confederation, in 1781, and to have possessed powers adequate to every national emergency, and coextensive with the object to be obtained. (Paterson J., Iredell J., and Blair J., in Penhallow *v.* Doane, 3 Dallas, 80, 91, 95, 111; Dane's Abr. vol. ix. App. pp. 1, 13, 16, 21, 25. Judge Wilson in his argument in support of the ordinance of Congress of December 31st, 1781, incorporating the Bank of North America. Wilson's Works, vol. iii. 397; Story's Comm. on the Constitution, vol. i. pp. 186–191.) Mr. Madison, who was a member of Congress at the time, says, that the members were generally of the opinion that they had no power, under the recently adopted articles of confederation, to incorporate the bank. They were, in fact, impelled to do it from the great expediency, if not absolute necessity of the institution, to sustain the war and our credit. The Madison Papers, vol. i. 104. According to Mr. Dane, the government of the United States has passed through three forms: 1. The revolutionary; 2. The confederate; 3. The constitutional; and the first and the third proceeded equally from the people in their original capacity.

of the British arms had, at that period, excited the most alarming apprehension for our safety, and Congress transferred to the commander-in-chief, for the term of six months, complete dictatorial power over the liberty and property of the citizens of the United States, in like manner as the Roman senate, in the critical times of the republic, was wont to have recourse to a dictator, *ne quid respublica detrimenti capiat.* (*b*) Such loose, undefined authority as the Union originally possessed was absolutely incompatible with any regular notions of liberty. Though it was exercised, in the instance we have referred to, and in other strong cases, with the best intentions, and under the impulse of an irresistible necessity, yet such an irregular sovereignty never can be durable. It will either dwindle into insignificance, or degenerate into despotism.

Imbecility of the confederation.

The powers of Congress, as enumerated in the articles of confederation, would perhaps have been competent for all the essential purposes of the Union, had they been duly distributed among the departments of a well-balanced government, and been carried down, through the medium of a national, judicial, and executive power, to the indi-
*213 vidual citizens * of the Union. The exclusive cognizance of our foreign relations, the rights of war and peace, and the right to make unlimited requisitions of men and money, were confided to Congress, and the exercise of them was binding upon the states. But, in imitation of all the former confederacies of independent states, either in ancient Greece or modern Europe, the articles of confederation carried the decrees of the federal council to the states in their sovereign or collective capacity. This was the great fundamental defect in the confederation of 1781; it led to its eventual overthrow; and it has proved pernicious or destructive to all other federal governments which adopted the principle. Disobedience to the laws of the Union must either be submitted to by the government, to its own disgrace, or those laws must be enforced by arms. The mild influence of the civil magistrate, however strongly it may be felt and obeyed by private individuals, will not be heeded by an organized community, conscious of its strength and swayed by its passions. The history of the federal governments of Greece, Germany, Switzerland, and

(*b*) Journals of Congress, vol. ii. p. 475.

Holland affords melancholy examples of destructive civil war springing from the disobedience of the separate members. I will mention only a single instance to this effect, taken from the generally uninteresting annals of the Swiss cantons. By one of the articles of the Helvetic alliance, the cantons were bound to submit any difference which might arise between them to arbitrators. In the year 1440, a dispute arose between Zurich on the one side, and the cantons of Schweitz and Glaris on the other, respecting some territorial claims. Zurich refused to submit to a decision against her, and the contending parties took to arms. All Switzerland was, of course, armed against Zurich, the refractory member. She sought protection from her ancient enemy, the house of Austria, and the controversy was not terminated in favor of the federal decree, until after six years of furious and destructive war. (*a*)

* Had there been sufficient energy in the government * 214 of the United States, under the articles of confederation, to have enforced the constitutional requisitions, it might have proved fatal to public liberty; for Congress, as then constituted, was a most unfit and unsafe depositary of political power, since all the authority of the nation, in one complicated mass of jurisdiction, was vested in a single body of men. It was, indeed, exceedingly fortunate, as the event has subsequently shown, that the state legislatures even refused to confer upon Congress the right to levy and collect a general impost, notwithstanding the refusal appeared to be extremely disastrous at the time, and was deeply regretted by the intelligent friends of the Union. Had such a power been granted, the effort to amend the confederation would probably not have been made, and the people of this coun-

(*a*) Hist. de la Confed. Helv. par Watteville, liv. v. Planta's Hist. of Switzerland, vol. i. last chapter. The Swiss Confederation was remodelled by the federal act of 1815, and consists, at the present time, of twenty-five cantons. The federal Diet consists of one deputy from each of the twenty-two cantons, with one vote each, and with a half vote only to the three additional cantons, created on a subdivision. The powers of war and peace, alliance and commerce, reside exclusively in the general Diet, with a common army and treasury; but each canton may conclude separate capitulations and treaties relative to local and municipal matters, and retain its original sovereignty unimpaired for all domestic purposes. Wheaton's Elements of International Law, 3d edit. p. 95.[1]

[1] For the present constitution of the Swiss Confederation, see Wheaton's Elements of International Law, 6th edit. p. 81, editor's note.

try might have been languishing to this day, the miserable victims of a feeble and incompetent union.

There was no provision in the articles of confederation enabling Congress to add a sanction to its laws. In this respect, they were more defective than some of the other federal governments which are to be met with in history. The Amphictyonic council, in Greece, had authority to fine and punish their refractory states. Lacedæmon and Phocis were both prosecuted before the council of Amphictyons, (which was a council of the representatives of twelve nations of Greece,) and all the Greek states were required by proclamation to enforce the decree. The Germanic diet, as it formerly existed, could put its members under the ban of the empire, by which their property was confiscated; and it was aided in enforcing obedience to its laws by a federal judiciary and an executive head. (*a*) Congress, under the old confederation, like the states general under the Dutch confederacy,

(*a*) The imperial chamber had appellate jurisdiction only. Its sentences were carried into execution against refractory states by the military force of the circles. Pfeffel, Abr. Chro. de l'Hist. d'Allemagne, tom. ii. p. 100; Potter's Const. Hist. p. 355. The new Germanic Confederacy, established under the acts of the Congress of Vienna in 1814 and 1815, and modified afterwards in 1832 and 1834, consists of the sovereign princes and free cities of Germany. It includes the great powers of Austria and Prussia, in respect to their possessions, which formerly belonged to the Germanic Empire, Denmark, in respect to the Duchy of Holstein, the Netherlands, Bavaria, Saxony, Hanover, Wurtemberg, and many other lesser principalities and states, together with the free cities of Lubeck, Frankfort, Bremen, and Hamburg. The federative Diet or Congress meets at Frankfort-on-the-Main, and is represented by the respective powers by their ministers, and their votes in the General Assembly or Diet are, in point of numbers, in some degree in a ratio to their relative power. While a few of the great powers have each four votes, others of a lesser degree have respectively three or two votes, and many of the states, and, among others, the free cities, have each only one vote. It is a singular and complicated union of mixed powers, partly national and partly separate and individual. It is declared, in the solemn acts of union, to be a federal league of the sovereign princes and free cities of Germany, formed for the exterior and interior safety of Germany, and the independence and inviolability of the confederated states. In their internal relations, the states are independent between themselves, and bound to each other by reciprocal rights and duties; and in respect to their external relations, they are a consolidated sovereign power, established on the principle of political union. The General Assembly has a great mass of sovereign powers confided to it; but its federal laws do not operate distinctly on the private individual subjects of the states of the union, but only through the agency of their separate governments. Though there are very great restraints upon the internal sovereignty of the states, yet the Germanic Confederacy is essentially an alliance between independent states, though, in many important particulars, they are subject to the confederate power. The sovereign powers are so intermixed and distributed among the members of the union, between the federal head and the separate state, as to render

*were restricted from any constructive assumption of *215
power, however essential it might have been deemed to the complete enjoyment and exercise of that which was given. No express grant conveyed any implied power; and it is easy to perceive, that a strict and rigorous adherence to the letter of the grant, without permission to give it a liberal and equitable interpretation, in furtherance of the beneficent ends of the government, must, in many cases, frustrate entirely the purposes of the power. A government too restricted for the due performance of its high trust will either become insignificant, or be driven to usurpation. We have examples of this in the government of the United Netherlands, before it was swept away by the violence of the French revolution. While that government moved within its constitutional limits, it was more absolutely nerveless than any other government which ever existed. The states general could neither make war or peace, or contract alliances, or raise money, without the consent of every province; nor the provincial states conclude those points, without the consent of every city having a voice in their assemblies. The consequence was, that the federal head was frequently induced, by imperious necessity, to assume power unwarranted by the fundamental charter of the union, and to dispense with the requisite unanimity. This was done in the years 1648, 1657, and 1661, as well as in another strong instance in 1668, given by Sir William Temple, and of which he was the author. (*a*)

The former confederation of this country was defective in not

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the system exceedingly complex; but it does not fall within the province of this work to enter into detail. A more general and precise sketch is given in Wheaton's Elements of International Law, 3d edit. pp. 79 – 92.[1]

(*a*) Temple's Works, vol. i. pp. 115, 128, 337. In 1781, a report was made by a committee of Congress, for submitting to the states an amendment to the 13th article of the confederation then recently subscribed by all the states, in which amendment it was to be provided, that in case of refusal or neglect of any one or more of the confederated states to abide by and obey the determinations of Congress, in respect to requisitions of men and money, agreeably to the apportioned quotas, Congress might employ the land and naval forces of the United States to compel compliance by the delinquent states, and to make distress of the property of such state and its citizens, and also prohibit and prevent their trade and commerce with other states and with foreign powers. Mr. Madison, and even General Washington, perceived the necessity of such a coercive federal power. The Madison Papers, vol. i. pp. 81, 86,

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[1] See Wheaton's Elements of International Law, 6th edit. p. 71, editor's note.

giving complete authority to Congress to interfere in contests between the several states, and to protect each state from internal violence and rebellion. In many respects our confederation was superior to those of Germany, Holland, or Switzerland, and particularly in the absolute prohibition to the several states, * 216 from any interference or * concern in foreign or domestic alliances, or from the maintenance of land or naval forces in time of peace. But in the leading features which I have suggested, and in others of inferior importance, it was a most unskilful fabric, and totally incompetent to fulfil the ends for which it was erected. Almost as soon as it was ratified, the states began to fail in a prompt and faithful obedience to its laws. As danger receded, instances of neglect became more frequent, and before the peace of 1783, the inherent imbecility of the government had displayed itself with alarming rapidity. The delinquencies of one state became a pretext or apology for those of another. The idea of supplying the pecuniary exigencies of the nation, from requisitions on the states, was soon found to be altogether delusive. The national engagements seem to have been entirely abandoned. (*a*) Even the contributions for the ordinary expenses of the government fell almost entirely upon the two states which had the most domestic resources. Attempts were very early made by Congress, and in remonstrances the most manly and persuasive, to obtain from the several states the right of levying, for a limited time, a general impost, for the exclusive * purpose of pro- * 217

88. But the power was never formally proposed to the states, or granted; and if it had been, it never would or could have been executed, without leading to the destruction of the Union.

(*a*) The efforts of Robert Morris, the superintendent of finance, in the years 1781 and 1782, to infuse some portion of life and energy into the languishing powers of the confederation were incessant, devoted, and masterly, and his appeals to the interests and honor of the states were most eloquent, but utterly unavailing. See, among others, his Circular Letters to the Governors of the States, of the dates of January 3d, February 15th, May 16th, and October 21st, 1782, and his Letters to Congress, of February 11th, and May 17th, 1782, and March 17th, 1783. Diplomatic Correspondence, edited by J. Sparks, vol. xii. Here we may say, if ever it might be truly said,

Si Pergama dextra
Defendi possent, etiam hac defensa fuissent;

and the perusal of the original correspondence of Mr. Morris, while at the head of the financial department of the United States, cannot but awaken in the breasts of the present generation, in respect to the talents and services of that accomplished statesman, the most lively sentiments of admiration and gratitude.

viding for the discharge of the national debt. It was found impracticable to unite the states in any provision for the national safety and honor. Interfering regulations of trade, and interfering claims of territory, were dissolving the friendly attachments, and the sense of common interest, which had cemented and sustained the union during the arduous struggles of the Revolution. Symptoms of distress, and marks of humiliation, were rapidly accumulating. It was with difficulty that the attention of the states could be sufficiently exerted to induce them to keep up a sufficient representation in Congress to form a quorum for business. The finances of the nation were annihilated. The whole army of the United States was reduced, in 1784, to 80 persons; and the states were urged to provide some of the militia to garrison the western posts. In short, to use the language of the authors of The Federalist, "each state, yielding to the voice of immediate interest or convenience, successively withdrew its support from the confederation, till the frail and tottering edifice was ready to fall upon our heads, and to crush us beneath its ruins."

Most of the federal constitutions in the world have degenerated or perished in the same way and by the same means. They are to be classed among the most defective political institutions which have been erected by mankind for their security. The great and incurable defect of all former federal governments, such as the Amphictyonic, the Achæan, and Lycian confederacies, in ancient Greece; and the Germanic, the Helvetic, the Hanseatic, and the Dutch republics, in modern history, is, that they were sovereignties over sovereigns, and legislations, not for private individuals, but for communities in their political capacity. The only coercion for disobedience was physical force, instead of the decree and the pacific arm of the civil magistrate. The inevitable consequence, in every case in which a member of such a confederacy chooses to be disobedient, is either a civil war, or an annihilation of national authority.

* The first effort to relieve the people of this country * 218 from a state of national degradation and ruin came from Virginia, in a proposition from its legislature in January, 1786, for a convention of delegates from the several states to regulate our commerce with foreign nations. The proposal was well received in many of the other states, and five of them sent delegates to a convention which met at Annapolis, in

Convention of states in 1786.

September, 1786. (*a*) This small assembly being only a partial representation of the states, and being deeply sensible of the radical defects of the system of the existing federal government, thought it inexpedient to attempt a partial and probably only a temporary and delusive alleviation of our national calamities. They concurred, therefore, in a strong application to Congress for a general convention, to take into consideration the situation of the United States, and to devise such further provisions as should be proper, to render the federal government not a mere phantom, as heretofore, but a real government, adequate to the exigencies of the Union. Congress perceived the wisdom, and felt the patriotism of the suggestion, and recommended a convention of delegates from the several states, to revise, amend, and alter the articles of con-

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(*a*) Though the proximate origin of the federal convention of 1787 was the proposition from Virginia, in 1786, yet the necessity of a national convention, with full authority to amend and reorganize the government, was first suggested, and fully shown, by Colonel Hamilton, in 1780, while he was an aid to General Washington. In his masterly and very extraordinary letter, (considering his age of only 23 years,) addressed to the Honorable James Duane, a member of Congress from New York, in September, 1780, he showed most manifestly the defects and absolute inefficiency of the articles of confederation; and that the United States, for their safety and happiness, if not for their future existence, stood in need of a national government, clothed with the requisite sovereign powers, such as the confederation theoretically contained, but without possessing any fit organs to receive them. This letter is to be seen at large in "The Life of Alexander Hamilton, by his son, John C. Hamilton," vol. i. pp. 284 – 305, and in the Hamilton Papers, vol. i. p. 428, edited by Dr. Hawks. The earliest legislative suggestion of a convention for the purpose of reforming the government was the concurrent resolutions of the two houses of the legislature of New York, passed on the 20th and 21st of July, 1782. They were introduced into the Senate by General Schuyler, and they stated, that "the radical source of most of our embarrassments was the want of sufficient power in Congress; that the confederation was defective in several essential points, particularly in not vesting the federal government either with a power of providing revenue for itself, or with ascertained and productive funds; that its defects could not be repaired, nor the powers of Congress extended, by partial deliberations of the states separately; and that it would be advisable to propose to Congress to recommend, and to each state to adopt the measure of assembling a general convention of the states, specially authorized to revise and amend the confederation." New York Journals of the Senate and Assembly, July 20th and 21st, 1782.

There is no doubt of the justness of the inference drawn by his son, (Life of Hamilton, vol. i. p. 405,) that Colonel Hamilton, who was attending the legislature when the resolutions passed, and who had an interview with a joint committee of the two houses, in his public character, under the superintendent of finance, and who was, at the same time, chosen a delegate in Congress, by the legislature, was the distinguished individual, who by his wisdom suggested, and by his influence promoted, that earliest authoritative measure taken for a general convention of the states.

federation. All the states, except Rhode Island, acceded to the proposal, and appointed delegates, who assembled in a general convention in Philadelphia, in May, 1787.

This was a crisis most solemn and eventful, in respect to our future fortune and prosperity. All the fruits of the Revolution, and perhaps the final destiny of republican government, were staked on the experiment which was then to be made to reform the system of our national compact. Happily for this country, and probably as auspiciously for the general liberties of mankind, the convention combined a very rare union of the best talents, experience, information, patriotism, probity, and character which the country afforded; and it commanded that universal public confidence which such qualifications were calculated to inspire. After several months of tranquil deliberation, the convention agreed, with unprecedented unanimity, on the * plan of government which now forms the * 219 constitution of the United States. This plan was directed to be submitted to a convention of delegates, to be chosen by the people at large in each state, for their assent and ratification. Such a measure was laying the foundations of the fabric of our national polity, where alone they ought to be laid, on the broad consent of the people. The constitution underwent a severe scrutiny and long discussion, not only in public prints and private circles, but solemnly and publicly, by the many illustrious statesmen who composed these local conventions. Nearly a year elapsed before it received the ratification of a requisite number of conventions of delegates of the people of the states to give it a political existence. New Hampshire was the ninth state which adopted the constitution, and thereby, according to one of its articles, it was to become the government of the states so ratifying the same. Her example was immediately followed by the powerful states of Virginia and New York; and on the 4th of March, 1789, the government was duly organized and put into operation. North Carolina and Rhode Island withheld some time longer their assent. Their scruples were, however, gradually overcome, and in June, 1790, the constitution had received the unanimous ratification of the respective conventions of the people in every state.

General Convention in 1787.

The peaceable adoption of this government, under all the circumstances which attended it, presented the case of an effort of deliberation, combined with a spirit of amity and of mutual con-

cession, which was without example. It must be a source of just pride, and of the most grateful recollection, to every American, who reflects seriously on the difficulty of the experiment, the manner in which it was conducted, the felicity of its issue, and the fate of similar trials in other nations of the earth.

LECTURE XI.

OF CONGRESS.

THE power of making laws is the supreme power in a state, and the department in which it resides will naturally have such a preponderance in the political system, and act with such mighty force upon the public mind, that the line of separation between that and the other branches of the government ought to be marked very distinctly, and with the most careful precision.

The constitution of the United States has effected this purpose with great felicity of execution, and in a way well calculated to preserve the equal balance of the government and the harmony of its operations. It has not only made a general delegation of the legislative power to one branch of the government, of the executive to another, and of the judicial to the third, but it has specially defined the general powers and duties of each of those departments. This is essential to peace and safety in any government, and especially in one clothed only with specific powers for national purposes, and erected in the midst of numerous state governments retaining the exclusive control of their local concerns. It will be the object of this lecture to review the legislative department; and I shall consider this great title in our national polity under the following heads: — (1.) The constituent parts of Congress, and the mode of their appointment. (2.) Their joint and separate powers and privileges. (3.) Their method of enacting laws, with the qualified negative of the President.

(1.) By the constitution, (*a*) all the legislative powers therein * granted are vested in a Congress, consisting of * 222 a Senate and House of Representatives.

Division of Congress into two houses.

The division of the legislature into two separate and independent branches is founded on such obvious principles of good policy, and is so strongly recommended by the unequivocal language of experience, that it has obtained the general approbation of the people of this country. One great

(*a*) Art. 1, sec. 1.

object of this separation of the legislature into two houses, acting separately and with co-ordinate powers, is to destroy the evil effects of sudden and strong excitement, and of precipitate measures, springing from passion, caprice, prejudice, personal influence, and party intrigue, which have been found, by sad experience, to exercise a potent and dangerous sway in single assemblies. A hasty decision is not so likely to proceed to the solemnities of a law, when it is to be arrested in its course, and made to undergo the deliberation, and probably the jealous and critical revision of another and a rival body of men, sitting in a different place, and under better advantages to avoid the prepossessions and correct the errors of the other branch. The legislatures of Pennsylvania and Georgia consisted originally of a single house. The instability and passion which marked their proceedings were very visible at the time, and the subject of much public animadversion; and in the subsequent reform of their constitutions, the people were so sensible of this defect, and of the inconvenience they had suffered from it, that in both states a Senate was introduced. No portion of the political history of mankind is more full of instructive lessons on this subject, or contains more striking proof of the faction, instability, and misery of states under the dominion of a single unchecked assembly, than that of the Italian republics of the middle ages, which arose in great numbers, and with dazzling but transient splendor, in the interval between the fall of the Western and the Eastern empire of the Romans. They were all alike ill-constituted, with a single unbalanced assembly.
*223 * They were alike miserable, and all ended in similar disgrace. (*a*)

Many speculative writers and theoretical politicians about the time of the commencement of the French revolution were struck with the simplicity of a legislature with a single assembly, and concluded that more than one house was useless and expensive. This led the elder President Adams to write and publish his great work, entitled, "A Defence of the Constitutions of Government of the United States," in which he vindicates, with much learning and ability, the value and necessity of the division of the legislature into two branches, and of the distribution of the different powers of the government into distinct departments. He reviewed

(*a*) Adams's Defence of the American Constitutions, vol. iii. p. 502.

the history, and examined the construction of all mixed and free governments which had ever existed, from the earliest records of time, in order to deduce, with more certainty and force, his great practical truth, that single assembles, without check or balance, or a government with all authority collected into one centre, according to the notion of M. Turgot, were visionary, violent, intriguing, corrupt, and tyrannical dominations of majorities over minorities, and uniformly and rapidly terminated their career in a profligate despotism.

This visionary notion of a single house of the legislature was carried into the constitution which the French National Assembly adopted in 1791. The very nature of things, said the intemperate and crude politicians of that assembly, was adverse to every division of the legislative body; and that as the nation which was represented was one, so the representative body ought to be one also. The will of the nation was indivisible, and so ought to be the voice which pronounced it. If there were two chambers, with a *veto* upon the acts of each other, in some cases they would be reduced to perfect inaction. By such reasoning, the National Assembly of France, consisting of upwards of one thousand members, *after a short and tumultuous debate, almost *224 unanimously voted to reject the proposition of an upper house. (*a*) The same false and vicious principle continued for some time longer to prevail with the theorists of that country; and a single house was likewise established in the plan of government published by the French convention in 1793. The instability and violent measures of that convention, which continued for some years to fill all Europe with astonishment and horror, tended to display, in a most forcible and affecting light, the miseries of a single unchecked body of men, clothed with all the legislative powers of the state. It is very possible that the French nation might have been hurried into the excesses of a revolution, even under a better organization of their government; but if the proposition of M. Lally Tolendal, to constitute a senate, or upper house, to be composed of members chosen for life, had prevailed, the constitution would have had much more stability, and would probably have been much better able to preserve the nation in order and tranquillity. Their own sufferings taught the French

(*a*) New Ann. Reg. for 1791. Hist. p. 49.

people to listen to that oracle of wisdom, the experience of other countries and ages, and which for some years they had utterly disregarded, amidst the hurry and the violence of those passions by which they were inflamed. No people, said M. Boissy d'Anglas, in 1795, can testify to the world with more truth and sincerity than Frenchmen can do, the dangers inherent in a single legislative assembly, and the point to which factions may mislead an assembly without reins or counterpoise. We accordingly find that in the next constitution, in 1795, there was a division of the legislature, and a council of ancients was introduced, to give stability and moderation to the government; and this idea of two houses was never afterwards abandoned.[1]

Senate of the United States.

(2.) The Senate of the United States is composed (*b*) of two senators from each state, chosen by the legis- *225 lature thereof, *for six years, and each senator has one vote. If vacancies in the Senate happen by resignation, or otherwise, during the recess of the legislature of any state, the executive thereof may make temporary appointments, until the next meeting of the legislature, which shall then fill such vacancies. (*a*) The Senate at present consists of sixty members, representing the thirty states of the Union. (*b*) In this part of the constitution we readily perceive the features of the old confederation. Each state has its equal voice and equal weight in the Senate, without any regard to disparity of population, wealth, or dimensions. This arrangement must have been the result of that spirit of amity and mutual concession which was

(*b*) Art. 1, sec. 3.

(*a*) It was settled by the Senate of the United States, in the case of Landman, in 1825, that the state executive could not make an appointment in the recess of the state legislature, in anticipation of an approaching vacancy. He must wait until the vacancy has actually occurred before he can constitutionally appoint.

(*b*) It was enlarged from 48 to 52 members, by the admission of Michigan and Arkansas as states into the Union, in 1836, (*vide infra*, p. 384,) and subsequently to 60 members, by the admission of Iowa, Florida, Wisconsin, and Texas as states into the Union.[1] *Vide infra*, p. 384. The members of the English House of Lords are about 460 in number.

[1] Under the late French Republic, the experiment of a single legislative assembly was again tried, but soon abandoned for the existing plan of two chambers of deputies.

[1] California was admitted, as a state, into the Union, Sept. 9, 1850; Minnesota, May 11, 1858; Oregon, Feb. 14, 1859; Kansas, Jan. 29, 1861.

rendered indispensable by the peculiarity of our political condition. It is grounded on the idea of sovereignty in the states; and every independent community, as we have already seen, is equal by the law of nations, and has a perfect right to dictate its own terms, before it enters into a social compact. On the principle of consolidation of the states, this organization would have been inadmissible, for in that case each state would have been merged in one single and entire government. At the time the articles of confederation were preparing, it was attempted to allow the states an influence and power in Congress in a ratio to their numbers and wealth; but the idea of separate and independent states was at that day so strongly cherished, that the proposition met with no success. (*c*)

The election of the Senate by the state legislatures is also a recognition of their separate and independent existence, and renders them absolutely essential to the operation of the national government. (*d*) There were difficulties, some years ago, as to the true construction of the constitution in the choice of senators. They were to be *chosen by the legislatures*, and the legislature was to prescribe the times, places, and manner of holding elections for senators, and Congress are authorized to make and alter such regulations, except as to the place. (*e*) As the legislature may prescribe the *manner*, it has been considered and settled, in New York, that the legislature may prescribe that they shall be chosen * by joint vote or ballot of the two houses, in case * 226 the two houses cannot separately concur in a choice, and then the weight of the Senate is dissipated and lost in the more numerous vote of the Assembly. This construction has become too convenient, and has been too long settled by the recognition of senators so elected, to be now disturbed; though I should think, if the question were a new one, that when the constitution directed that the senators should be chosen *by the legislature*, it meant not the members of the legislature *per capita*, but the legislature in the true technical sense, being the two houses acting in their separate and organized capacities, with the ordinary constitutional right of negative on each other's proceedings. This was a con-

(*c*) Journals of Congress, vol. iii. p. 416.

(*d*) It gives to the state governments, says the Federalist, No. 62, such an agency in the formation of the federal government as must secure their authority.

(*e*) Art. 1, sec. 4.

temporary exposition of the clause in question, and was particularly maintained in the well-known letters of the Federal Farmer, (a) who surveyed the constitution with a jealous and scrutinizing eye.

The small number and long duration of the Senate were intended to render them a safeguard against the influence of those paroxysms of heat and passion, which prevail occasionally in the most enlightened communities, and enter into the deliberation of popular assemblies. In this point of view, a firm and independent Senate is justly regarded as an anchor of safety amidst the storms of political faction; and for want of such a stable body, the republics of Athens and Florence were overturned by the fury of commotions, which the Senates of Sparta, Carthage, and Rome might have been able to withstand. The characteristical qualities of the Senate, in the intendment of the constitution, are wisdom and stability. The legal presumption is, that the Senate will entertain more enlarged views of public policy, will feel a higher and juster sense of national character, and a greater regard for stability in the administration of the government. These qualities, it is true, may, in most cases, be equally found in the other branch
* 227 of the legislature, but * the constitutional structure of the House is not equally calculated to produce them; for, as the House of Representatives comes more immediately from the people, and the members hold their seats for a much shorter time, they are presumed to partake, with a quicker sensibility, of the prevailing temper and irritable disposition of the times, and to be in much more danger of adopting measures with precipitation, and of changing them with levity. A mutable legislation is attended with a formidable train of mischiefs to the community. It weakens the force, and increases the intricacy of the laws, hurts credit, lessens the value of property, and it is an infirmity very incident to republican establishments, and has been a constant source of anxiety and concern to their most enlightened admirers. (a) A disposition to multiply and change laws, upon the spur of the occasion, and to be making constant and restless experiments with the statute code, seems to be the natural disease of popular assemblies. In order, therefore, to counteract such a dangerous propensity, and to maintain a due portion of confidence in the gov-

(a) Letter 12.

(a) Federalist, vol. ii. No. 62.

ernment, and to insure its safety and character at home and abroad, it is requisite that another body of men, coming likewise from the people, and equally responsible for their conduct, but resting on a more permanent basis, and constituted with stronger inducements to moderation in debate, and to tenacity of purpose, should be placed as a check upon the intemperance of the more popular department. (*b*)

The Senate has been, from the first formation of the government, divided into three classes; and the rotation of the classes was originally determined by lot, and the seats of one class are vacated at the expiration of the second year, and one third of the Senate are chosen every second year. (*c*) This provision was borrowed from a similar one in some of the state constitutions, of which Virginia gave the first example; and it is admirably calculated, on the one hand, to infuse * into the * 228 Senate, biennially, renewed public confidence and vigor; and, on the other, to retain a large portion of experienced members, duly initiated into the general principles of national policy, and the forms and course of business in the House. The Vice-President of the United States is President of the Senate, but has no vote, unless they be equally divided. (*a*) It would seem to be the better opinion, that he has authority as presiding officer, *virtute officii*, and without any special delegation of power by the Senate, to preserve order; but from some scruples on that subject, the Senate, in 1838, established by rule, that every question of order should be decided by the President of the Senate without debate, subject to an appeal to the Senate. (*b*)

The superior weight and delicacy of the trust confided to the Senate, and which will be shown more fully hereafter, is a reason why the constitution (*c*) requires, not only that the senators should

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(*b*) The constitution of Rhode Island, which was organized and went into operation in 1843, has constituted the Senate of that state upon conservative principles, while the House of Representatives is constructed upon the basis of population, giving to each city and town a representative in a ratio to its number of inhabitants. The Senate is composed of only one member from each city or town, so that the legislative power cannot be wielded by overwhelming numbers in a few great manufacturing towns or cities, to the oppression of the agricultural towns. It is a salutary and provident check to the tyranny of majorities over minorities.

(*c*) Constitution of the United States, art. 1, sec. 3.

(*a*) Art. 1, sec. 3.

(*b*) Story's Comm. vol. ii. pp. 212, 213. (*c*) Art. 1, sec. 3.

be chosen for six years, but that each senator should be thirty years of age, and nine years a citizen of the United States, and, at the time of his election, an inhabitant of the state for which he is chosen. The same age was also requisite for a Roman senator, though in their executive offices no qualification of age was required. *Ne ætas quidem distinguebatur quin prima juventa consulatum ac dictaturam inirent.* (*d*) It has been also deemed fit and proper, in a country which was colonized originally from several parts of Europe, and has been disposed to adopt the most liberal policy towards the rest of mankind, that a period of citizenship, sufficient to create an attachment to our government, and a knowledge of its principles, should render an emigrant eligible to office. The English policy is not quite so enlarged. No alien-born can become a member of parliament. This disability was imposed by the act of settlement of 12 Wm. III. c. 2; and no bill of naturalization can be received in either house of parliament, without such disabling clause in it.

House of Representatives.

(3.) The House of Representatives is composed of members chosen every second year by the people of the several states, who are qualified electors of the most numerous branch of the legislature of the state to which they belong. The legislature of each state prescribes the times, places, and manner of holding elections for representatives, but Congress may, at any time, by law, make or alter such regulations. (*e*) No person can be a representative until he has attained the age of twenty-five years, and has been seven years a citizen of the United States, and is, at the time of his election, an inhabitant of the state in which he is chosen. (*f*)

* 229 * The qualifications of electors of the assembly, or most numerous branch of the legislature, in the several state governments, generally are, that they be of the age of twenty-one years and upwards, and free resident male citizens of the state in which they vote; and, in some of the states, they are required to possess property, and in the most of them to be white, as well as

(*d*) Tac. Ann. lib. 11, 22.

(*e*) Art. 1, sec. 4.

(*f*) Art. 1, sec. 2. The question whether the individual states can superadd to, or vary the qualifications prescribed to the representative by the constitution of the United States, is examined in Mr. Justice Story's Commentaries on the Constitution, vol. ii. pp. 99–103. But the objections to the existence of any such power appear to me to be too palpable and weighty to admit of any discussion.

free citizens. The description is, almost everywhere, so large as to include all persons who are of competent discretion, and are interested in the welfare of the government, and liable to bear any of its duties or burdens. The House of Representatives may, therefore, very fairly be said to represent the whole body of the American people. (*a*) Some of the state constitutions have pre-

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(*a*) In almost all the states, no property qualification whatever, not even paying taxes, or serving in the militia, or being assessed for and working on the public highway, is requisite for the exercise of the right of suffrage. Every free male (and in a majority of the states) white citizen of the age of twenty-one years, and who shall have been a resident for some short given period, varying in those states from two years to three months, is entitled to vote. In Illinois it has been adjudged, that the word *inhabitant*, in the constitution of the state, means all persons who have a fixed permanent *residence bona fide*, and not one casual or temporary, and that a residence of six months entitles every inhabitant to vote; — that under the ordinance of 1787, and the constitution of the state, and the statutes of 1819, 1821, 1823, 1829, and 1833, *aliens*, being residents, are entitled to vote, though the distinction between citizens and inhabitants is sustained for various other purposes; and that it belongs to the states respectively to prescribe the qualifications of persons entitled to exercise the right of suffrage, not only as to state, but to congressional elections. Spragins *v.* Houghton, 2 Scammon, 377. This latitudinary extension of the right of suffrage to aliens seems to be peculiar to some of the states formed out of the Northwestern Territory, under the ordinance of the Confederated Congress in 1787. The state of Michigan adopted it; so has Wisconsin, by her constitution in 1846; but in Ohio, by the act of 1831, the right of suffrage is restricted to natural-born and naturalized citizens, and so I think it ought to be in all sound policy; and the view taken of the subject in the above case, by one of the counsel who argued the cause, is a masterly argument. In the states of Massachusetts, Connecticut, Pennsylvania, Delaware, Georgia, (the words of the constitution of Georgia are, that the electors shall "have paid all taxes which may have been required of them, and which they may have had an opportunity of paying, agreeably to law, for the year preceding the election,") Ohio, and Louisiana, the elector is required, in addition to age and residence, to have been assessed and paid, or, in Ohio, *charged* with a state or county tax, or, in Connecticut, to have served in the militia. The revised constitution of Pennsylvania, in 1838, requires the elector to have resided one year in the state, and ten days in the district, immediately preceding the election, and to have within two years, if of twenty-two years of age, paid a tax, assessed ten days before the election. And in the amended constitution of Louisiana, in 1845, the qualification of having paid a tax is dropped, and the elector is only required to have been two years a citizen of the United States, or resident in the state for two consecutive years next preceding the election, and the last year in the parish where he proposes to vote, and no person shall vote except in his own parish or election precinct. In Rhode Island, New Hampshire, Virginia, and North Carolina, a qualification as to property is still requisite. The Rhode Island charter of 1663 prescribed no regulation as to the right of suffrage. The power of admitting freemen was exercised by the general assembly, until they authorized the towns to admit freemen. In 1724 an act was passed by the general assembly, providing that no person should be admitted a freeman, unless he owned a *freehold* estate of a certain value, or was the eldest son of such a freeholder. Such has been

scribed the same, or higher qualifications as to property, in the elected than in the electors, and some of them have required a

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the law ever since, and the requisite value of the estate is said to be $134. But the new constitution of Rhode Island, which went into operation in May, 1843, has established and defined the property qualification of electors, being native citizens as to real estate, to be of the value of $134, over and above all encumbrances, and together with a previous residence and home in the state for one year, and of six months in the city or town in which he votes; or, without it, the elector must have had his residence and home in the state two years, and in the town or city in which he votes, six months next preceding the election, and his name must be registered in the city or town before the end of December preceding the election, and he must have paid a tax of $1, or been enrolled in the militia, and done military service or duty therein. No pauper shall be permitted to be registered or to vote. Naturalized citizens are required to have a freehold estate of the value before required; and no person can vote to impose a tax, or to expend money, in any town or city, unless he shall have paid a tax within the year preceding, upon property valued at least at $134. These provisions, together with that relating to the judicial tenure and compensation, mentioned *infra*, at p. 295, render the aspect of the constitution of that state more wise and conservative than any other state constitution recently formed or amended. Indeed, that constitution seems to stand pre-eminently valuable in the guards it introduces against one of the most alarming evils incident in large towns and cities to our democratical establishments. I mean the fraudulent abuse of the right of suffrage. The previous residence of the elector in the town or ward where he offers his vote, and his ascertained qualifications ought to be defined and registered, as absolutely essential to the order and purity of elections. The legal provision on this subject in Massachusetts is valuable. Every citizen must have resided within the state one year, and within the town in which he may claim a right to vote, six months preceding the election. The selectmen of each town, ten days before the first Monday in March, and before the second Monday in November, annually, are to make out a correct list of all qualified voters for officers to be elected at those periods, and ten days before the election to cause their lists to be posted up in two public places in each town. The selectmen are also to meet in session within forty-eight hours next preceding the election, to receive evidence of the qualification of persons claiming to vote, and to correct the lists, and to meet for the like purpose for one hour on the day of election, and before the opening of it. The moderator at town meetings refuses, of course, to receive the votes of persons not on the list. Mass. R. S. pp. 63, 64. The constitution of the state of Florida, of 1839, contains a wholesome provision on this subject, in declaring that the legislature should, at its first session, provide for the registration of all the qualified electors in each county, and thereafter, from time to time, of all who may become such qualified electors, and that every free white male qualified elector, when he offers to vote, must be a citizen, and have had his home, domicil, or permanent abode in the state for two years next preceding, and for the last six months in the county in which he offers to vote. The constitution of the state of Texas, of 1845, is quite latitudinary on the subject, and all white male citizens who have resided in the state one year, and six months in the district, county, city, or town, are entitled to vote. The constitution of Iowa, in 1846, goes much further, and gives the right of suffrage to every citizen who has resided in the state six months, and in the county thirty days. In Virginia, the elector must be either a freeholder or owner of a leasehold estate, or a householder, and have been assessed and paid taxes. In North Carolina, the electors of the Senate must be freeholders, as was the case formerly in New

religious test. But the constitution of the United States requires no evidence of property in the representatives, nor any declaration

York, and the electors of the House of Commons must have paid public taxes, and none but freeholders can be members of either house of the legislature. In Georgia, the constitution of 1789 required a property qualification in the members of the legislature, over and above the amount requisite to discharge their debts; but this qualification was dropped in the amended constitution of 1798. In New Hampshire, a state senator must be seized of a freehold estate, in the state, in his own right, of the value of £200, and a state assemblyman must have an estate within his district, of the value of £100, one half thereof to be a freehold. Rhode Island and New Jersey were the only states in the Union that brought down their constitutions from 1776 triumphantly against every assault; but the former of those states changed its constitution in 1842, and the latter in 1844. The progress and impulse of popular opinion is rapidly destroying every constitutional check, every conservative element, intended by the sages, who framed the earliest American constitutions, as safeguards against the abuses of popular suffrage. Thus, in Massachusetts, by the constitution of 1780, a defined portion of real or personal property was requisite in an elector, and that qualification was dispensed with by the amended constitution of 1821. By the practice, under the charters of Rhode Island and Connecticut, a property qualification was requisite to constitute freemen and voters. This test is still continued in Rhode Island, but is done away with in Connecticut by their constitution of 1818. The New York constitution of 1777 required the electors of the Senate to be freeholders, and of the Assembly to be either freeholders, or to have rented a tenement of the yearly value of forty shillings. The amended constitution of 1822 reduced this qualification down to payment of a tax, or performance of militia duty, or assessment and work on the highways. But the constitution, as again amended in 1826, swept away all these impediments to universal suffrage. In the further Revised Constitution of New York, in 1846, art. 3, sec. 3, 5, the Senate is divided into 32 senatorial districts, and each district to choose one senator. So the members of Assembly are to be divided into 128 assembly districts, and each district to choose one member. This appears to be a valuable improvement on the election of members of the legislature. To entitle a person to vote in the election districts, he must have been a citizen for ten days, and an inhabitant of the state one year next preceding the election, and for the last four months a resident of the county where he may offer to vote, and he must vote in the election district of which he shall be a resident at the time, and for thirty days next preceding the election. The constitution further provides, that for the purpose of voting, no person should be deemed to have *gained* or lost a residence by reason of his presence or absence while employed in the service of the United States, nor while engaged in the navigation of the waters of the state, or of the United States, or of the high seas, nor while a student in any seminary of learning, nor while kept at any almshouse or other asylum at public expense, or while confined in any public prison. Art. 2, sec. 1, 3. These provisions are very good, if duly and faithfully construed and observed. The constitution further adds, sec. 4, that laws shall be made for ascertaining, by proper proofs, the citizens who shall be entitled to the right of suffrage. There was the same as this last provision in the constitution of 1822, and the legislature, in the year 1840, carried the constitutional provision into effect, according to its spirit and meaning, by the act entitled, "An Act to prevent illegal voting in the city of New York, and to promote the convenience of legal voters," 63 sess. c. 78, by dividing the city into election districts, and providing for *a registry of the legal voters* in each district, to be made in each year, and the registry was made

of religious belief. He is only required to be a citizen of a competent age, and free from any undue bias or dependence, by not holding any office under the United States. (*b*)

The term for which a representative is to serve ought not to be so short as to prevent him from obtaining a comprehensive acquaintance with the business to which he is deputed; nor so long as to make him forget the transitory nature of his seat, and his state of dependence on the approbation of his constituents. It ought also to be considered as a fact deeply interesting to the

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conclusive evidence of the right of persons so registered to vote. This act worked well, and was admirably calculated to prevent illegal voting and frauds in election, by which the right of suffrage in the city has been grossly perverted and abused. But the registry provision was repealed on the 28th February, 1842, 65th sess. c. 56,) and the abuses, impositions, and frauds attending the city elections left to reassume their wonted mischiefs. The constitutional provision of 1846, as it stands, is therefore a delusive provision, unless wiser counsels prevail in future legislatures.[1] In Maryland, by their constitution of 1776, electors were to be freeholders, or possessing property to £30; but by legislative amendments in 1801 and 1809, (and amendments are allowed to be made in that state by an ordinary statute, if confirmed by the next succeeding legislature,) all property qualifications were disregarded. The constitution of Virginia, in 1776, required electors to be freeholders; but the constitution of 1830 reduced the property qualifications to that of being the owner of a leasehold estate, or a householder. In Mississippi, by the constitution of 1817, electors were to have been enrolled in the militia, or to have paid taxes; but those impediments to universal suffrage were removed by the new constitution of 1833. So the freehold qualification, requisite, in certain cases, by the constitution of Tennessee of 1796, is entirely discontinued by the constitution of 1835. All the states and constitutions, formed since 1800, have omitted to require any property qualifications in an elector, except what may be implied in the requisition of having paid a state or county tax; and even that is not in the constitutions more recently formed or amended, except in the Rhode Island constitution of 1843. In some of the states, as in New Hampshire, for instance, a property qualification is still required in the elected, as governor or as members of the two houses of the legislature. Such a rapid course of destruction of the former constitutional checks (and of which further examples are hereafter noticed, see *infra*, p. 295, note) is matter for grave reflection; and to counteract the dangerous tendency of such combined forces as universal suffrage, frequent elections, all offices for short periods, all officers elective, and an unchecked press; and to prevent them from racking and destroying our political machines, the people must have a larger share than usual of that wisdom which is *first pure, then peaceable, gentle, and easy to be entreated.*

(*b*) Art. 1, sec. 6.

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[1] In the year 1859, the legislature of New York passed an act, entitled "An Act for ascertaining by proper proofs the citizens who shall be entitled to the right of suffrage, and to prevent fraudulent voting." This act applied to the whole state, provided for a complete Registry of Voters, and contained ample provisions for the prevention of fraud, &c. *Vide* N. Y. Session Laws of 1859, p. 895, and of 1861, ch. 307, p. 701.

character and utility of representative republics, that very frequent elections have a tendency to render the office less important than it ought to be deemed, and the people inattentive in the exercise of their rights, or else to nourish restlessness, instability, and factions; whilst, on the other hand, long intervals between the elections are apt to make them produce too much excitement, and consequently to render the periods of their * re- * 230 turn a time of too much competition and conflict for the public tranquillity. The constitution has certainly not deviated in this respect to the latter extreme, in the establishment of biennial elections. It has probably selected a medium, which, considering the situation and extent of our country, combines as many advantages, and as many inconveniences, as any other term which might have been inserted.

The representatives are directed to be apportioned among the states, according to numbers, which is determined by adding to the whole number of free persons, including those bound to service for a term of years, and exclusive of Indians not taxed, three fifths of all other persons. (*a*) The number of representatives cannot exceed one for every thirty thousand, but each state is entitled to have at least one representative. The actual enumeration or census of the inhabitants of the United States is to be made every ten years, and the representatives newly apportioned upon the same, under a new ratio, according to the relative increase of the population of the states. (*b*) The number fixed by the constitution in the first instance, and until a census was taken, was sixty-five members. The apportionment under the fourth census, by the act of Congress of 7th March, 1822, was to a ratio of one representative for every forty thousand persons in each state, and it made the whole number of representatives amount to two hundred and thirteen members. Under the fifth census, completed in 1831, and which made the population of the United States amount to twelve millions eight hundred and fifty-six thousand persons, the ratio of representation was enlarged to one representative for every forty-seven thousand and seven hundred persons, making in the whole, two hundred and forty members. (*c*)

(*a*) Art. 1, sec. 2.

(*b*) Art. 1, sec. 2.

(*c*) Act of Congress, May 22d, 1832, c. 91. In 1836 the territories of Michigan and Arkansas were admitted as states into the Union. See *infra*, p. 384. And in 1845

The rule of apportionment of the representatives among the several states according to numbers has been attended with great difficulties in the application, because the relative numbers in each state do not, and never will, bear such an exact proportion to the aggregate, that a common divisor for all will leave no fraction in any state. Every decennial apportionment has raised and agitated the embarrassing question. As an absolute, exact, relative equality is impossible, the principle which has ultimately prevailed is the principle of approximation, by making the apportionment among the several states according to their numbers, *as near as may be*. This is done by allowing to every state a member for every fraction of its numbers, exceeding a moiety of the ratio, and rejecting all representations of fractions less than a moiety. (*d*)

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the territories of Iowa and Florida were also admitted as states. See *infra*, p. 384. And in 1846 the territory of Wisconsin, and in 1845 the Republic of Texas. Id. By the 6th census, completed in 1841, the number of persons in the United States was 17,069,453, making an increase over the census of 1830, of 4,202,646 inhabitants, and showing a gain in a ratio exceeding 32½ per cent for the last ten years; and by the act of Congress of June 25, 1842, c. 47, the ratio of representation was enlarged to one representative for every 70,680 persons in each state, and one additional representative for each state having a greater fraction than one moiety of the said ratio. This ratio reduced the number of the members of the House of Representatives, after the 3d of March, 1843, to 223 members, besides a delegate from the three territories then existing. By this reduction, and with the addition of members from the new states, the House of Representatives consisted, on the 1st of January, 1847, of 230 members, and representation by delegates of certain territories had ceased.[1] The act of Congress last mentioned also prescribed, that the number of representatives in each state, under the apportionment, should be elected *by districts* composed of contiguous territory, equal in number to the number of representatives to which the state should be entitled; and that no one district should elect more than one representative. This direction was authorized by the provision in the constitution, (art. 1, sec. 4,) that "the times, places, and manner of holding elections for senators or representatives shall be prescribed in each state by the legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the place of choosing senators." The election of members of Congress by districts had been heretofore adopted in some of the states, and not in others. Uniformity on the subject was desirable, and the measure itself was recommended by the wisdom and justice of giving, as far as possible, to the local subdivisions of the people of each state, a due influence in the choice of representatives, so as not to leave the aggregate minority of the people in a state, though approaching perhaps to a majority, to be wholly overpowered by the combined action of the numerical majority, without any voice whatever in the national councils.

(*d*) See Story's Comm. on the Constitution, vol. ii. pp. 141 – 171, where the subject is fully examined, and the opinion of Mr. Jefferson on the one side, and Mr. Webster's

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[1] By the census completed in 1851, the number of inhabitants in the United States is 23,191,876. By the twenty-fifth section of the act of May 23, 1850, 233 representatives are to be apportioned among the states.

The rule of apportionment established by the constitution is exposed to the objection that three fifths of the slaves in the southern states are computed in establishing the apportionment of the representation. But this article was the result of necessity, and grew out of the fact of the existence * of domestic * 231 slavery in a portion of our country. The evil has been of too long standing, and is too extensive and too deeply rooted to be speedily eradicated, or even to be discussed without great judgment and discretion. But the same rule which apportions the representatives, extends to direct taxes; and the slaves in the southern states, while they give those states an increased number of representatives, contribute, on the other hand, when that mode of taxation is resorted to, equally to increase the measure of their contributions. (*a*)

The number of the House of Representatives would seem to be quite large enough, on its present computation; and, unless the ratio be hereafter enlarged from time to time, as the exigency may require, the House would be in danger of increasing too rapidly, and would probably become, in time, much too unwieldy a body for convenience of debate and joint consultation. A due acquaintance with the local interests of every part of the Union ought to be carried into the House, and a sufficient number collected, for all the purposes of information, discussion, and diffusive sympathy with the wants and wishes of the people. When these objects are obtained, any further increase neither promotes deliberation, nor increases the public safety. All numerous bodies of

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report in the Senate, in April, 1832, on the other, are given at large. These documents contain the substance of the arguments for and against the principle of apportionment as adopted and settled by Congress. The same difficulty arose in the legislature of New York, in 1791, on the apportionment of the state representation, according to the census then recently taken, and the same principle of approximation was adopted; and the author of this note was then one of the members of the House of Assembly who concurred in that rule. (Journal of the Assembly of New York for 1791, p. 26.) But the constitution of New York gave greater facility to such a rule, for it directed the senators in each district to be apportioned according to the number of the qualified electors, *as near as may be;* and this is the manner in which the amended constitution of 1822 expresses itself on the subject.[2]

(*a*) Federalist, vol. ii. No. 54.

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[2] The constitution of 1822 provided that each senate district should contain an equal number of *inhabitants*, as nearly as may be, excluding aliens, paupers, and persons of color not taxed. And the constitution of 1846 has the same provision, except that it does not exclude paupers.

men, although selected with the greatest care, are too much swayed by passion, and too impatient of protracted deliberation.

The United States, in their improvements upon the exercise of the right of representation, may, as we apprehend, claim pre-eminence over all other governments, ancient and modern. Our elections are held at stated seasons, established by law. The people generally vote by ballot, in small districts, and public officers preside over the elections, receive the votes, and maintain order and fairness. (*b*) Though the competition between candi-
* 232 dates is active, and the zeal * of rival parties sufficiently excited, the elections are everywhere conducted with tranquillity. The legislature of each state prescribes the times, places, and manner of holding elections, subject, however, to the interference and control of Congress, which is permitted them for the sake of their own preservation, and which, it is to be presumed, they will not be disposed to exercise, except when any state shall neglect or refuse to make adequate provision for the purpose. The privilege of voting, as we have already seen, is conferred upon all persons who are of sufficient competency by their age, and of sufficient ability to take care of themselves. The ancient Greeks and Romans had not only very imperfect notions of the value of representation, but the number and power of their popular assemblies were so great, and they were so liable to disorder, as to render it a very provident measure with them, to be guarded in diffusing the privileges of free citizens. Not a tenth part of the people of Athens were admitted to the privilege of voting in the assemblies of the people; and, indeed, nine tenths of the inhabitants throughout all Greece were slaves. (*a*) In Sparta,

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(*b*) Voting by ballot was introduced in the province of Massachusetts in 1634. In New York, the people voted *viva voce*, until after the Revolution, and then voting by ballot was constitutionally established. Elections in Virginia and Kentucky are still *viva voce*, and not by ballot, and this provision is established by the existing constitutions of those states. In Georgia, also, by the constitution of 1790, all elections by the people were by votes *viva voce;* but the legislature might otherwise direct; and they have since declared all elections to be by ballot.

(*a*) Mitford's Greece, vol. i. pp. 354, 357. In the treatise of G. F. Schömann, a profound German scholar, De Comitiis Atheniensium, published in Latin in 1819, and translated into English, at Cambridge, in England, in 1838, the democratical government of Athens is discussed with masterly erudition. He states, that during the vigor of the Athenian democracy, every citizen of the age of eighteen had a right to hold offices, and to give a vote at the assemblies of the people. That the most crowded assemblies rarely exceeded 8,000, though Attica contained 20,000 citizens;

the number of votes was fixed at ten thousand. In Rome, this privilege was for many ages confined to the *Pomœria* of the city, (*b*) and it continued to be so confined, and to be tolerable

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pp. 65, 69, 128. That all were reckoned citizens whose parents were both such; p. 66. To assume unlawfully the rights of a citizen, was punished by being sold into slavery; p. 74. The assemblies of the people were convened by magistrates, (*Prytanes and Strategi,*) and the chairmen or presidents (*Prytanes and Proedri*) presided at them, and proposed the subjects to be discussed, and had the bills, which had been previously prepared and sanctioned by the senate, (for the fundamental law allowed none others to be considered,) recited, and gave permission to the orators to speak, though the liberty of addressing the people on the subject from the Bema was open to all. The chairman also put the question to vote, whether to adopt or reject the proposition. The assembly had the right to vary or alter it; pp. 53, 81, 90, 101, 104, 107, 130, 245. The people generally voted by show of hands, and sometimes by ballot; p. 127. They voted by tribes, (of which there were ten,) but a majority of the whole assembly, collectively, decided.

The structure and history of the Athenian democracy has much to warn, and very little to console the friends of freedom. From the incurable defect, among others, of assembling the people to make laws in masses, and not by representation, and from the want of a due and well-defined separation of the powers of government into distinct departments, that celebrated republic became violent and profligate in its career, and ended in despotism and slavery. The general assemblies of the people, without any adequate checks, assumed and exercised all the supreme powers of the state, legislative, executive, and judicial.

(*b*) Thirty-five tribes voted in the *comitia* held in the city of Rome; but the city tribes (*Plebs urbana*) consisted only of four within the walls of the city, and the *Liberti* were inscribed in the city tribes. The other thirty-one tribes were rural tribes, who occupied the lands for a considerable district of country around the city, and they were the ruling and influential body. See Lond. Q. Review, No. 112, for June, 1836, the Review of Professor Druman's History of Rome. But the Roman slaves were not represented, and Rome exercised the right of absolute sovereignty over the dominions of its auxiliaries. The Roman citizens, who exclusively exercised as voters the powers of government, bore, therefore, a very small proportion in numbers to the gross amount of the inhabitants. The Roman mode of passing laws, and voting in their *comitia*, was orderly, and under great checks, during the best periods of the government. When a law was proposed and discussed, and the religious rites duly performed, and no intercession made, the people proceeded to vote, and every citizen was ordered to repair to his century. The method of voting was originally *viva voce*, but after the year of the city 614, it was by ballot by the *leges tabellariæ*, which applied equally to the election of magistrates, to public trials, and to making and repealing laws. The people were made to pass in order over some narrow planks, called *pontes*, into the *septa*, or enclosures, where certain officers delivered to every voter two tablets, one for and one against the proposition, and each person threw into a chest which of them he pleased, and they were pointed off, and the greatest number of points, either way, determined the sense of the century, and the greatest number of centuries passed for the voice of the whole people, who either passed or rejected the law. See Heineccius's Antiquit. Rom. Jur. lib. 1, tit. 2, sec. 3–11. Opera, tom. iv., where the ancient learning on the subject is collected. And see Hooke's Rom. Hist. b. 1, c. 7, sec. 4, note. Cicero condemned the secret vote by

*233 in its operations, until the memorable social war * extended it to all the inhabitants of Italy, south of the Rubicon and the Arnus. As no test of property or character was required, and as the people assembled within the walls of Rome in immense masses, and not merely to vote, but to make laws, this great innovation produced the utmost anarchy and corruption, and has justly been regarded as precipitating the fall of that commonwealth. (*a*)

The English nation, in common with the other feudal governments of Europe, anciently enjoyed the blessings of popular representation, and the knights, citizens, and burgesses were intended to represent the farmers, merchants, and manufacturers, being the several orders and classes of people of which the nation was composed. (*b*) But the mutations of time and commerce, in

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ballot, as being a cover for corrupt and hypocritical votes. His object was to obtain or measure the moral value of the votes by a consideration of the persons who gave them. Cic. De Legibus, b. 3. Mr. Barnham, the translator of Cicero's treatises, De Republica and De Legibus, in his note to b. 3, De Legibus, learnedly discusses the superior value and safety of open voting by poll; but the orderly and specific mode of voting by ballot seems to render the latter preferable in that point of view.

(*a*) Montesquieu's Esprit des Lois, tom. i. lib. 2, c. 2; Grand. et Decad. des Rom. c. 9. Augustus allowed the Decurions, or privileged citizens, in the provincial chartered cities in Italy, to vote at home for Roman magistrates, and to send *in writing their ballots under seal to the polls at Rome.* This, says Suetonius, was conferring upon them, in a degree, the privileges and dignity of Rome itself. Sueton. Aug. c. 46.

(*b*) 1 Black. Comm. 174; Millar on the English Constitution, b. 2, c. 6, sec. 1. In all the northern nations, says Turner, in his learned History of England during the Middle Ages, vol. i. 416, great councils were attached to the ruling chief, from their first emerging from the woods of Germany. The destruction of the Anglo-Saxon nobility, in their revolts against William the Conqueror, and the confiscation of their property among his Norman barons, had annihilated the members of their ancient witenagemotes, but did not terminate the institution. The Norman barons were as independent as the Saxon witena, and they surrounded the sovereign in a national council, as well after the conquest as before. But though the national councils, which were common to the Celtic and Teutonic tribes, may have contained within them the germ of the English Parliament, yet the modern antiquarians generally conclude, that the Anglo-Saxon witenagemote had no representation of the ceorls, or inferior freemen. It consisted of the monarch, the aristocracy, and the clergy, with very little of the real liberty of deliberation and voting. Hallam on the Middle Ages, c. 8, part 1; Turner's Hist. of the Anglo-Saxons, vol. iii.; Palgrave's Hist. of England, vol. i.; Sir Wm. Betham's Dignities, Feudal and Parliamentary. The latter writer concludes, from a careful examination of an immense mass of ancient documents, that there existed no deliberative legislative assembly in England prior to the reign of Hen. III. That was the era of the establishment of *magna charta*, which declared that no taxation (the three feudal *aids* excepted) was to be imposed but by Parliament, which was to consist of the higher clergy and nobility, and of the tenants in chief under the

depopulating ancient boroughs, and in establishing new cities and great manufacturing establishments, without any direct parliamentary representation, insensibly changed the structure of the House of Commons, and rendered it, in theory at least, a very inadequate and imperfect organ of the will of the nation. Archdeacon Paley observed, * many years ago, (*a*) that * 234 about one half of the Commons were elected by the people, and the other half came in by purchase, or by the nomination of single proprietors of great estates. So extremely unequal was the popular vote at elections in England, that less than seven thousand voters returned nearly one half of the House of Commons. (*b*)

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crown. This was the era of the introduction of popular representation in England, and of the establishment of the House of Commons in the time of Hen. III. and Edward I. Lands held by feudal tenure were held on the condition of performing certain services; and being performed or rendered, the feudatory could not rightfully be assessed further without his consent. The royal towns obtained charters of privileges by which they were relieved from arbitrary taxation on paying or rendering the stipulated assessments. When the wants of the crown increased, and further aids were necessary, it was deemed expedient for the king and his council of peers to consult the wishes, and take the consent of the small country freeholders, and the inhabitants of the cities and boroughs; and knights, citizens, and burgesses were accordingly summoned to appear by representation in the great council or legislature under the feudal system. The first edict for the election of a representation of the commonalty of the realm of knights, citizens, and burgesses, from counties, cities, and boroughs, was issued under the usurpation of Simon Montfort, in the 49th of Hen. III. The great council of the nation had hitherto consisted of the prelates and barons, assisted by the officers of the state, and the judges.

(*a*) Moral Philosophy, p. 369, edit. 1786.

(*b*) In 1831, it was asserted, that out of six hundred and fifty-eight members, of which the English House of Commons consisted, the number of four hundred and eighty-seven were elected by one hundred and forty-four peers, and one hundred and twenty-three commoners. In 1832, the English House of Commons was reformed by three several statutes, passed to *amend the representation of the people of England and Wales, Scotland and Ireland.* Under the first of these statutes, fifty-six English boroughs were totally disfranchised, and thirty boroughs were reduced each to the right of returning only one member. Twenty-two new boroughs were created, with a right to each of returning two members; and Manchester, Birmingham, Leeds, and Sheffield were among the towns invested with that privilege. Sixteen other new boroughs were created, with the right to each of returning one member. Thirty-four shires were subdivided in respect to members of Parliament, so as to give an increase of sixty-three knights. The qualifications of electors, consisting of freeholders, lessees, and copyholders, were altered, and the name of every voter required to be previously registered. The number of members of the reformed House of Commons consists in the aggregate of 658, the same number as before the reformed bill, viz.: 417 members for England, 29 for Wales, 53 for Scotland, 105 for Ireland. By the English Reform Act of 2 Wm. IV. c. 45, the qualifications of electors of the commons house of Parliament, for *knights of the shires*, were substantially as follows: That they must

But notwithstanding the great imperfection of the constitution of the English House of Commons, if it were to be tested by the arithmetical accuracy of our own political standards, nevertheless, in all periods of English history, it felt strongly the vigor of the popular principle. While on the continent of Europe the degeneracy of the feudal system, the influence of the papal hierarchy, the political maxims of the imperial or civil law, and the force of standing armies, extinguished the bold and irregular freedom of the Gothic governments, and abolished the representation of the people, the English House of Commons continued to be the asylum of European liberty; and it maintained its station against all the violence of the Plantagenet line of princes, the haughty race of the Tudors, and the unceasing spirit of despotism in the house of Stuart. And when we take into consideration the admirable plan of their judicial polity, and those two distinguished guardians of civil liberty, trial by jury, and the freedom of the press, it is no longer a matter of astonishment that the nation, in full possession of those inestimable blessings, should enjoy greater security of person and property than ever was enjoyed in Athens or Sparta, Carthage or Rome, or in any of the commonwealths of Italy during the period of the middle ages.

I proceed next to consider the privileges and powers of the two houses of Congress, both aggregately and separately. The

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have a freehold or copyhold estate in possession, or as lessee or assignee in possession of the unexpired residue of a term of sixty years, of the clear yearly value in either case of not less than £10, above all rents and charges thereon; or of the unexpired residue in possession of a term of twenty years, of the clear yearly value of £50 above all rents and charges; or be a tenant in occupation of lands, liable to a yearly rent of £50. The elector must also have been duly registered, and, to be entitled to the registry, he must have been in the actual possession of the house, or of the rents and profits thereof, for six months previous to the last day of July in each year. The elector for *citizens and burgesses* must occupy, as owner or tenant, a house or building, either separately or jointly, with land within the borough, of the clear yearly value of £10, and rated to the poor-rate, and been duly registered, and a resident for six months previous to the last day of July in each year. The regulations respecting the registry and the revision of the lists are specific and minute, to guard more effectually against the destructive evil of fraudulent and spurious votes. No person is entitled to vote unless his name appears on the register of electors, and his qualifications cannot be questioned at the polls, except on three points: (1.) His identity with the person registered; (2.) as to having voted already at the election; (3.) that he continues to possess the registered qualification.[1]

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[1] See statute, 6 Vic. c. 18, §§ 80 – 83.

Congress is to assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they by law appoint a different day. (*c*)

Privileges of the two houses of Congress.

* Each house is made the sole judge of the * 235 election returns and qualifications of its members. (*a*) The same power is vested in the British House of Commons, and in the legislatures of the several states; and there is no other body known to the Constitution, to which such a power might safely be trusted. It is requisite to preserve a pure and genuine representation, and to control the evils of irregular, corrupt, and tumultuous elections; and as each house acts in these cases in a judicial character, its decisions, like the decisions of any other court of justice, ought to be regulated by known principles of law, and strictly adhered to, for the sake of uniformity and certainty. A majority of each house constitutes a quorum to do business, but a smaller number may adjourn from day to day, and compel the attendance of absent members, in such manner and under such penalties as each house may provide. (*b*) Each house, likewise, determines the rules of its proceedings, and can punish its members for disorderly behavior; and, with the concurrence of two thirds, expel a member. (*c*) Each house is likewise bound to keep a journal of its proceedings, and from time to time publish such parts as do not require secrecy, and to enter the yeas and nays on the journal, on any question, when desired by one fifth of the members present. (*d*) Neither house, during the session of Congress, can, without the assent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting. (*e*) The members of both houses are likewise privileged from arrest during their

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(*c*) Art. 1, sec. 4.

(*a*) Art. 1, sec. 5.

(*b*) In the English House of Commons forty members are requisite to form a quorum for business; but in 1833 the requisite number was reduced to twenty, so far as related to the morning sittings, appropriated to private business and petitions. The House of Lords may proceed to business if only three lords be present.

(*c*) The power of expulsion is in its nature discretionary, and its exercise of a more summary character than the power of judicial tribunals. Case of J. Smith, 1807. The cases are numerous in which members of the House of Commons in England have been called to account and punished by admonition, imprisonment, or expulsion, as the case might require, for offensive words or conduct before the House. May's Treatise on the Law of Parliament, p. 80.

(*d*) Art. 1, sec. 5.

(*e*) Art. 1, sec. 5.

attendance on Congress, and in going to and returning from the same, except in cases of treason, felony, and breach of the peace. (*f*) These privileges of the two houses are obviously necessary for their preservation and character; and what is still more important to the freedom of deliberation, no member can be questioned out of the House for any speech or debate therein. (*g*)

There is no power expressly given to either house of Con-
* 236 gress to punish for contempts, except when committed * by their own members; but in the case of Anderson, who was committed by order of the House of Representatives, for a contempt of the House, and taken into custody by the sergeant-at-arms, an action of trespass was brought against the officer, and the question on the power of the House to commit for a contempt was carried by writ of error to the Supreme Court of the United States. (*a*) The court decided that the House had that power, and

(*f*) Art. 1, sec. 6. This privilege is confined to the members, and does not extend to their servants, and it applies as well to arrests on execution as to arrests on mesne process. The arrest is illegal and void, and after the cessation of the privilege, the member may be arrested *de novo* for the same cause. If elected a member *while in custody*, on civil process of any kind, his privilege as a member operates to entitle him to his discharge during the continuance of the privilege. This is the English parliamentary law. May's Treatise, &c. pp. 93, 97. But by several statutes in the reign of Geo. III. (10 Geo. III. 45 Geo. III. 47 Geo. III.) privilege is no stay of proceedings in civil suits, down to judgment and execution, with the exception of personal arrest and imprisonment, nor does the privilege extend to commitments for contempts in courts of justice. Wellesley's case and Charlton's case, cited in May's Treatise, &c. 108, 109.

(*g*) Art. 1, sec. 6. The question whether a senator or member of the House of Representatives is liable to impeachment for conduct in his legislative capacity is considered by Mr. Justice Story, in his Commentaries, vol. ii. pp. 259 – 262; and the weight of authority, and the reason and policy of the thing, are decidedly in the negative, and in favor of the principle that members of Congress should be exempt from impeachment and punishment for acts done in their collective or congressional capacity. Though a member of Congress is not responsible out of Congress for words spoken there, though libellous upon individuals; yet if he causes his speech to be published, he may be punished as for a libel by action or indictment. This is the English and the just law.[1] The cases of Lord Abingdon and of Creevy, 3 Esp. N. P. Cases, 228, 1 Maule & Sel. 278.

(*a*) Anderson *v.* Dunn, 6 Wheaton, 204.[2]

[1] A printer, under the order of the House, of a document in its nature libellous was held not to be protected. Stockdale *v.* Hansard, 9 Ad. & Ell. 1; 11 do. 253, 273, 297. For the history of this important controversy see May's Treatise, 119 to 130, and *In re* Fernandez, 10 C. B. (N. S.) 3.

[2] In this case the alleged contempt was committed *within the District of Columbia*, the process was served therein and the arrest was made therein; thus narrowing the ques-

that it was an implied power, and of vital importance to the safety, character, and dignity of the House.[2] The necessity of its existence and exercise was founded on the principle of self-preservation; and the power to punish extends no further than imprisonment, and that will continue no longer than the duration of the power that imprisons. The imprisonment will terminate with the adjournment or dissolution of Congress. (*b*)

(*b*) The duration of imprisonment for contempts terminates also in England upon the close of the existing session of Parliament. Stockdale *v.* Hansard, cited in May's Treatise on the Privileges of Parliament, p. 75. The decision of the Supreme Court, in the case of Anderson, is accompanied with a course of reasoning which would seem to be sufficient to place the authority of either house of Congress to punish contempts and breaches of privileges on the most solid foundation, independent of the absolute authority of the decision. The constitutional exercise of the same power by each house of Parliament has been repeatedly vindicated in Westminster Hall in the most masterly manner.[3] Lord Ch. J. De Grey, in Rex *v.* Crosby, 3 Wils.

tion, in fact, to the power of Congress within the District of Columbia; but the case turned on the point whether the officer was justified in making the arrest where the Speaker's warrant did not specify what the alleged contempt was. The court held that, inasmuch as the House had the power of bringing a party before it to answer for a contempt, *in certain cases*, the sergeant-at-arms was not bound to go behind the warrant for his justification.

[2] In the case of Frank B. Sanborn, arrested upon the warrant of the Vice-President of the United States and President of the Senate, for an alleged contempt in refusing to obey the summons of a Committee of Investigation of the Senate, and brought up on a writ of *habeas corpus*, before the Supreme Judicial Court of Massachusetts, the hearing was had before Shaw C. J. assisted by Metcalf, Bigelow, Merrick, and Hoar, Associate Justices, and the opinion was delivered by Shaw C. J. Many points were raised upon the hearing which the court declined to consider, but simply decided that the sergeant-at-arms had no authority to arrest by deputy, and the writ was allowed on that ground. See the Monthly Law Reporter (Boston) for May, 1860, where the case, with the arguments of counsel, is reported at length. In Burnham *v.* Morrissey, 14 Gray, 226, the same court held that under the constitution of Massachusetts the House of Representatives was not the final judge of its own powers and privileges, in cases involving the rights and liberties of citizens, but that the legality of its action could be examined by that court. In the particular case the commitment for contempt was held to be legal.

[3] But see Kelly *v.* Carson, 4 Moore Privy Council 63, and Fenton *v.* Hampton, 11 Id. 347. In the latter case, the plaintiff was summoned to appear before an Investigating Committee of the Legislative Council of Van Dieman's Land. He did not attend, and was then ordered before the bar of the Council, but refused to obey. By vote of the Council he was arrested, upon a warrant issued by the Speaker, and committed. He then brought an action of trespass against the Speaker and Sergeant-at-arms, and the Court sustained the same. Fleming C. J. of the island, delivered a learned and exhaustive opinion, in which he held that the right of committing a witness for contempt, for not appearing before an investigating committee, was not inherent to a legislature created by a written charter: that the power of the Parliament of Great

The House of Representatives has the exclusive right of originating all bills for raising revenue, and this is the only privilege that house enjoys, in its legislative character, which is not shared equally by the other; and even those bills are amendable by the Senate in its discretion. (*c*) The two houses are an entire and perfect check upon each other, in all business appertaining to legislation; and one of them cannot even adjourn, during the session of Congress, for more than three days, without the consent of the other, nor to any other place than that in which the two houses shall be sitting. (*d*)

Powers of Congress.

The powers of Congress extend generally to all subjects of a national nature. Many of those powers will hereafter become the subject of particular observation and criticism. At present, it will be sufficient to observe, generally, that Congress are authorized to provide for the common defence and general welfare; and for that purpose, among other express

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188; Lord Ellenborough, in Burdett *v.* Abbott, 14 East, 1. It is a power inherent in all legislative assemblies, and is essential to enable them to execute their great trusts with freedom and safety; and it has been frequently exercised, not only in Congress, but by the respective branches of the state legislatures, and may be considered as indisputably acknowledged and settled. Story's Commentaries, vol. ii. 305 – 317. What acts shall amount to a contempt of either house of Congress are not defined, and must be left to the judgment and discretion of the House, under the circumstances of each case. In England, libels upon the character or proceedings of either house of Parliament, or any of its members, are regarded as breaches of privilege, and punishable as for contempts, by imprisonment. May's Treatise on the Law and Privileges of Parliament, p. 62. Burdett *v.* Abbott, *supra*. But with us, such a course of redress has not been adopted, and the house that was injured would probably, if redress was sought, direct a public prosecution by indictment. The act of Congress of 14th July, 1798, made it an indictable offence to libel the Government, Congress, or President of the United States. See *infra*, vol. ii. 24.[4]

(*c*) Art. 1, sec. 7. (*d*) Art. 1, sec. 5.

Britain for this purpose is *its own peculiar*, traditional custom, established by long prescription: that it does not find its origin in the bare fact that the houses of Parliament are legislative bodies, and that it is not an inherent and incidental power pertaining to them simply because they are such. He also added, that such a power, though it might sometimes be convenient and expedient, was never necessary for the purposes of legislation. On an appeal, the decision was affirmed by the Privy Council, several eminent judges sitting in the case.

[4] See the case of Howard *v.* Gosset, 10 Ad. & Ell. N. S. 359, 411. In this case the powers and privileges of Parliament were very elaborately and ably discussed; but the Court of Exchequer Chamber, in the final decision, placed itself on the narrow ground that the Speaker's warrant must be construed as process of a superior court, not *appearing* to go beyond its jurisdiction.

grants, they are authorized to lay and collect taxes, * duties, imposts, and excises; — to borrow money on the credit * 237 of the United States; — to regulate commerce with foreign nations, and among the several states, and with the Indian tribes; — to declare war, and define and punish offences against the law of nations; — to raise, maintain, and govern armies, and a navy; — to organize, arm, and discipline the militia; — and to give full efficacy to all powers contained in the constitution. Some of these powers, as the levying of taxes, duties, and excises, are concurrent with similar powers in the several states; but in most cases, these powers are exclusive, because the concurrent exercise of them by the states separately would disturb the general harmony and peace, and because they would be apt to be repugnant to each other in practice, and lead to dangerous collisions. The powers which are conferred upon Congress, and the prohibitions which are imposed upon the states, would seem, upon a fair and just construction of them, to be indispensable to secure to this country the inestimable blessings of union. The articles of confederation, digested during the American war, intended to confer upon Congress powers nearly equal to those with which they are now invested; but that compact gave them none of the means requisite to carry those powers into effect. And if the sentiment which has uniformly pervaded the minds of the people of this country be a just one, that the consolidated union of these states is indispensable to our national prosperity and happiness, — and if we do not wish to be once more guilty of the great absurdity of proposing an end, and denying the means to attain it, — then we must conclude that the powers conferred upon Congress are not disproportionate to the magnitude of the trust confided to the Union, and which the Union alone is competent to fulfil.

The rules of proceeding in each house are substantially the same; and though they are essential to the transaction of business with order and safety, they are too minute to be treated at length in an elementary survey of the constitutional polity and general jurisprudence of the United States. The House of Representatives choose their own Speaker, but the Vice-President of the United States is, *ex officio*, President of the Senate, and gives the casting vote when they are equally divided. The proceedings and discussions in the two houses are public. This affords the com- Rules of proceeding. * 238

munity early and authentic information of the progress, reason, and policy of measures pending before Congress, and it is likewise a powerful stimulus to industry, to research, and to the cultivation of talent and eloquence in debate. Though these advantages may be acquired at the expense of much useless and protracted discussion, yet the balance of utility is greatly in favor of open deliberation; and it is certain, from the general opposition to the experiment that was made and continued for some years by the Senate of the United States, of sitting with closed doors, that such a practice, by any legislative body in this country, would not be endured.

The ordinary mode of passing laws is briefly as follows: (*a*)

(*a*) See the standing rules and orders of the House of Representatives, printed in 1795, by Francis Childs. The rules and forms of proceeding in legislative bodies are not only essential to orderly and free discussion and deliberation, but those forms become substance; for they operate as safeguards of liberty, and a protection to the minority against the violence and tyranny of the majority. It was an observation of Mr. Onslow, for many years Speaker of the English House of Commons, that he had often heard old and experienced members say, that nothing tended more to throw power into the hands of the administration, than a neglect of or departure from the rules of proceeding. Hatsel's Precedents of Proceedings in the House of Commons, and Jefferson's Manual of Parliamentary Practice, and especially May's Treatise upon the Law, Privileges, Proceedings, and Usage of Parliament, London, 1844, and Cushing's Rules of Proceeding and Debate in Deliberative Assemblies, Boston, 1845, ought to be thoroughly studied by all leading and efficient members in the legislative assemblies.

Among the rules of the House of Representatives, the establishment of what is termed *the previous question* is of great importance. It is understood not to apply when a bill or motion is under discussion in a committee of the whole House, but only when the same is before the House, with the Speaker in the chair. The previous question is admitted when demanded by a majority of the members present; and it enables a majority at any time to put an end *in the House* to all discussion, and to put the minority to silence by a prompt and final vote on the main question. It is whether the question under debate shall now be put; and, until it is decided, it precludes all amendment and debate of the main question, and all motions to amend, commit, or postpone the main question. If the previous question be decided affirmatively, the main question is to be put instantaneously, and no member is allowed to amend or discuss it. The previous question has long been in use in the English House of Commons; and if it be carried in the affirmative, no alteration can then take place, no debate is suffered to intervene, and the Speaker puts the main question immediately. Dwarris on Statutes, 1830, p. 291. During the period of the Continental Congress, under the articles of confederation, the previous question was regarded rather as a preliminary inquiry into the propriety of the main question. This was also the case under the present Constitution of the United States, for many years. Its object was to avoid decision on delicate questions, as inexpedient; and if it was decided that the main question be put, the main question was open to debate. It was not until 1811 that the previous question attained its present absolute sway. The Hon. William

One day's notice of a motion for leave to bring in a bill, in cases of a general nature, is required. Every bill must have three readings previous to its being passed, and these readings must be on different days, and no bill can be committed or amended until it has been twice read. Such little checks in the forms of doing business are prudently intended to guard against surprise or imposition. In the House of Representatives, bills, after being twice read, are committed to a committee of the whole House, when the * Speaker leaves the chair, and takes a part in the debate as an ordinary member, and a chairman is appointed to preside in his stead. When a bill has passed one house, it is transmitted to the other, and goes through a similar form; though, in the Senate, there is less formality, and bills are often committed to a select committee, chosen by ballot. If a bill be altered or amended in the house to which it is transmitted, it is then returned to the house in which it originated, and if the two houses cannot agree, they appoint committees to confer together on the subject. (*a*) When a bill is engrossed, and has passed the sanction of both houses, it is transmitted to the President of the United States for his approbation. If he approves of the bill, he signs it. If he does not, it is returned, with his objections, to the

Mode of passing laws.

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President's negative.

Gaston, a member of the House of Representatives from North Carolina, in 1816, made a fruitless effort to expunge the previous question from the rules of the House. His speech was a very able and well-informed discussion of the merits of the rule, and he regarded it as a formidable instrument of tyranny of majorities over minorities, and, to the extent to which it is carried, without a precedent in the annals of any free deliberative assembly.

Legislation was a science cultivated with so much care and refinement among the ancient Romans, that they had laws to instruct them how to make laws. The Lex Licinia and Lex Ebutia, the Lex Cæcilia and Lex Didia, provided checks, that the law should not unintentionally contain any particular personal privileges, or weaken the force of former laws, or be crowded with multifarious matter. Gravina, De Ortu et Progressu Juris Civilis, lib. 1, c. 29.

(*a*) By the Revised Constitution of New York, of 1846, it is declared that no bill shall be passed unless by the assent of a majority of all the members elected to each branch of the legislature; and the question upon the final passage shall be taken immediately upon its last reading, and the yeas and nays entered on the journal.[1]

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[1] By the Revised Statutes of New York, previous notice of certain applications to the legislature must be given by advertisement. 1 R. S. 155, sec. 1. The want of this notice will not, however, affect the validity of an act. Smith *v.* Helmer, 7 Barb. N. Y. 416.

house in which it originated, and that house enters the objections at large on its journal, and proceeds to reconsider the bill. If, after such reconsideration, two thirds of that house should agree to pass the bill, it is sent, together with the objections, to the other house, by which it is likewise reconsidered, and, if approved by two thirds of that house, it becomes a law. (*b*) But, in all such cases, the votes of both houses are determined by yeas and nays, and the names of the persons voting for and against the bill are entered on the journals. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same becomes a law, equally as if he had signed it, unless Congress, by adjournment, in the mean time, prevents its return, and then it does not become a law. (*c*)[2]

The practice in Congress, and especially in the second or last session of each Congress, of retaining most of their bills until within the last ten days, is attended with the disadvantage of shortening the time allowed to the President for perusal and reflection upon them, and of placing within the power of the President the absolute negative of every bill presented within
* 240 the last ten days preceding the 4th of * March; and this he can effect merely by retaining them, without being obliged to assign any reason whatever; for he is entitled to ten days to deliberate. Most of the bills that are presented to the President in the second session of every Congress were, a few years ago, presented to him within the last ten days, and generally within the last two days; but the rules of Congress have latterly checked the evils and danger of such an accumulation of business on the last days of the session.

This qualified negative of the President upon the formation of

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(*b*) The constitution does not say whether the vote of two thirds of each house on the reconsideration of a bill returned by the President, with objections, shall be two thirds of the members elected, or only two thirds of the members present. It is understood that the latter construction has been adopted in practice.

(*c*) Art. 1, sec. 7.

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[2] Under the provision of the Constitution of New York, which is in this respect like that of the United States, it has been decided by the Court of Appeals that a law presented to the Governor for his action, during the last ten days of the session of the legislature, might be approved and signed by the Governor after the end of the session and thereby become a law. People *v.* Bowen, 21 N. Y. 517.

laws is, theoretically at least, some additional security against the passage of improper laws, through prejudice or want of due reflection; but it was principally intended to give to the President a constitutional weapon to defend the executive department, as well as the just balance of the constitution against the usurpations of the legislative power. To enact laws is a transcendent power; and if the body that possesses it be a full and equal representation of the people, there is danger of its pressing with destructive weight upon all the other parts of the machinery of the government. It has, therefore, been thought necessary, by the most skilful and most experienced artists in the science of civil polity, that strong barriers should be erected for the protection and security of the other necessary powers of the government. Nothing has been deemed more fit and expedient for the purpose than the provision that the head of the executive department should be so constituted as to secure a requisite share of independence, and that he should have a negative upon the passing of laws; and that the judiciary power, resting on a still more permanent basis, should have the right of determining upon the validity of laws by the standard of the constitution. A qualified negative answers all the salutary purposes of an absolute one, for it is not to be presumed that two thirds of both houses of Congress, on reconsideration, with the reasoning of the President in opposition to the bill spread at large upon their journals, will ever concur in any unconstitutional * measure. (*a*) In the English consti- * 241 tution, the king has an absolute negative; but it has not been necessary to exercise it since the time of William III. The influence of the crown has been exerted in a more gentle manner, to destroy any obnoxious measure in its progress through the two houses of Parliament. Charles I. stood for a long time upon the strict and forbidding rights of his prerogative; but he was compelled, by the spirit and clamor of the nation, to give his assent to bills which cut down that prerogative, and placed the power of government in the hands of the Parliament. The peremptory *veto* of the Roman tribunes, who were placed at the door of the Senate,

(*a*) This qualified negative of the President has, in the progress of the administration of the government, since the first publication of these Commentaries, in 1826, become a very grave power, and applied, under the ordinary name of *veto*, with a familiarity which appears not to have been anticipated by the generation which adopted the constitution.

would not be reconcilable with the spirit of deliberation and independence which distinguishes the councils of modern times. The French constitution of 1791, a labored and costly fabric, on which the philosophers and statesmen of France exhausted all their ingenuity, and which was prostrated in the dust in the course of one year from its existence, gave to the king a negative upon the acts of the legislature, with some very feeble limitations. Every bill was to be presented to the king, who might refuse his assent; but if the two following legislatures should successively present the same bill in the same terms, it was then to become a law. The constitutional negative given to the President of the United States appears to be more wisely digested than any of the examples which have been mentioned. (*b*)

(*b*) The organization of the two houses of Congress, and the principles on which it rests, were profoundly discussed in The Federalist, from No. 52 to No. 64, inclusive. There is no work on the subject of the constitution, and on republican and federal government generally, that deserves to be more thoroughly studied. The Federalist appeared originally in a series of numbers, published in the New York daily papers, between October, 1787, and June, 1788. They were read with admiration and enthusiasm as they successively appeared, and by no person more so than the author of this note, who made a fruitless attempt at the time to abridge them for the benefit of a country village print. No constitution of government ever received a more masterly and successful vindication. I know not, indeed, of any work on the principles of free government that is to be compared, in instruction, and intrinsic value, to this small and unpretending volume of The Federalist; not even if we resort to Aristotle, Cicero, Machiavel, Montesquieu, Milton, Locke, or Burke. It is equally admirable in the depth of its wisdom, the comprehensiveness of its views, the sagacity of its reflections, and the fearlessness, patriotism, candor, simplicity, and elegance with which its truths are uttered and recommended. Mr. Justice Story acted wisely in making The Federalist the basis of his Commentary; and as we had the experience of nearly fifty years since The Federalist was written, the work of Judge Story was enriched with the results of that experience, and it is written in the same free and liberal spirit, with equal exactness of research and soundness of doctrine, and with great beauty and elegance of composition.

LECTURE XII.

OF JUDICIAL CONSTRUCTIONS OF THE POWERS OF CONGRESS.

I PROCEED to consider the cases in which the powers of Congress have been made the subject of judicial investigation. (*a*)

(1.) Congress have declared by law that the United States were entitled to priority of payment over private creditors in cases of insolvency, and in the distribution of the estates of deceased debtors. The act of Congress of 31st July, 1789, sec. 21, confined the priority to custom-house bonds. The act of 4th August, 1790, c. 35, sec. 45, limited the priority in the same manner. The act of 2d May, 1792, placed the surety in a custom-house bond, who paid the debt, on the same footing, in respect to priority, as the United States; and it confined the cases of insolvency mentioned in the former law to those of a voluntary assignment, and of attachments against absconding, concealed, or absent debtors. The act of 3d March, 1797, c. 74, sec. 5, went further, and gave the United States a preference in all cases whatsoever, whoever might be the debtor, or however he might be in-

Priority of U. States as a creditor.

(*a*) Mr. Justice Story, in his Commentaries on the Constitution of the United States, vol. i. pp. 382 – 442, has given a very rational view of the rules of interpretation applicable to the constitution. I have confined myself in this lecture to those authoritative expositions which have been given to it by the courts of the United States; and I agree entirely with that learned commentator, that we are to look to the instrument itself, "as a constitution of government ordained and established by the people of the United States." The instrument furnishes essentially the means of its own interpretation; and to resort to it was the practice of the late Chief Justice Marshall, in those clear and admirable judicial views of the constitution which, so far as they go, leave us nothing more perfect to expect or desire. It is, at the same time, just and true, that "the most unexceptionable source of *collateral* interpretation is from the practical exposition of the government itself, in its various departments, upon particular questions discussed, and settled upon their own intrinsic merits. These approach the nearest in their own nature to judicial expositions, and have the same general recommendation that belongs to the latter. They are decided upon solemn argument, *pro re nata*, upon a doubt raised, upon a *lis mota*, upon a deep sense of their importance and difficulty, in the face of the nation, with a view to present action, in the midst of jealous interests, and by men capable of urging or repelling the grounds of argument, from their exquisite genius, their comprehensive learning, or their deep meditation upon the absorbing topic." Story's Comm. vol. i. p. 392. See, also, *infra*, p. 313, to S. P.

debted, in case the debtor became insolvent, or the assets in the hands of his representatives, after his death, were insufficient to pay his debts. This priority was declared to extend to cases in which the insolvent debtor had made a voluntary assignment of all his property, or in which his effects had been attached as an absconding, concealed, or absent debtor, or in which an act of legal bankruptcy had been committed. This act applies and gives the preference as against deceased debtors, whether the debt was contracted before or after the passage of the act, provided there be only general creditors, without any specific lien created. (*b*) The act of March 2d, 1799, c. 128, sec. 65, provided, that in like
* 244 cases * of insolvency, or where any estate in the hands of executors, administrators, or assignees should be insufficient, debts due to the United States, on bonds taken under the collection act, should have preference; and sureties in such bonds, on paying the same, had the same preference as was reserved to the United States. (*a*)

These were the legislative provisions, giving preference to debts due to the United States; and in *Fisher* v. *Blight*, (*b*) the authority of Congress to pass such laws was drawn in question. The point discussed in that case was, whether the United States, as holders of a protested bill of exchange, negotiated in the ordinary course of trade, were to be preferred to the general creditors, when the debtor becomes bankrupt. The Supreme Court decided that the acts of Congress, giving that general priority to the United States, were constitutional. It was a power founded on the authority to make all laws which should be necessary and proper to carry into effect the powers vested by the constitution in the government of the United States. Where the end was within the lawful powers

(*b*) Commonwealth *v.* Lewis, 6 Binney, 266.

(*a*) Hunter *v.* United States, 5 Peters U. S. 173. In the case of The United States *v.* Couch, C. C. U. S. New York, April Term, 1841, it was declared to have been the unvaried construction of the 65th section of the act of March 2d, 1799, that the priority therein given to the United States, to be paid out of the estate of an insolvent debtor, takes effect only when the insolvency is established by an assignment of all his property, either by his own act or by act of law, and when such assignment is carried into execution by the assignees. Hunt's Merchants' Magazine, New York, August, 1841, p. 168; U. S. *v.* Wood & Ives, Ibid. p. 170, S. P.[1]

(*b*) 2 Cranch, 358.

[1] S. P. United States *v.* Howland, 4 Wheaton, 108.

of the government, Congress possessed the choice of the means, and were empowered to use any means which were in fact conducive to the exercise of the powers granted. The government is to pay the debts of the Union, and must be authorized to use the means most eligible to effect that object. It has a right to make remittances, by bills or otherwise, and to take those precautions which will render the transaction safe. If this claim of priority interferes with the right of the state sovereignties, respecting the dignity of debts, and defeats the measures which they would otherwise have a right to adopt to secure themselves, it is a necessary consequence of the supremacy of the laws of the Union, on all subjects to which the legislative power of Congress extends.

The principle was here settled, that the United States are * entitled to secure to themselves the exclusive privi- * 245 lege of being preferred as creditors to private citizens, and even to the state authorities, in all cases of the insolvency or bankruptcy of their debtor. But the court observed, that no lien was created by the statutes giving the preference. No *bona fide* transfer of property, in the ordinary course of business, was overreached. It was only a priority of payment, which, under different modifications, was a regulation in common use; and a *bona fide* alienation of property, before the right of priority attached, was admitted to be good.

The next case that brought into discussion this question of priority, was that of *The United States* v. *Hooe*. (*a*) It was there held, that the priority to which the United States were entitled did not partake of the character of a lien on the property of public debtors. The United States, in the mere character of creditor, have no lien on the real estate of their debtor. If the priority existed from the time the debt was contracted, and the debtor should continue to transact business with the world, the inconvenience would be immense. The priority only applied to cases where the debtor had become actually and notoriously insolvent, and, being unable to pay his debts, had made a voluntary assignment of all his property, or having absconded or absented himself, his property had been attached by process of law. A *bona fide* conveyance of *part* of the property of the debtor, not for the fraudulent purpose of evading the law, but to secure a fair cred-

(*a*) 3 Cranch, 73.

itor, is not a case within the act of Congress giving priority. (*b*) In this case of *The United States* v. *Hooe*, a collector of the revenue had mortgaged part of his property to his surety in his
* 246 official bond, to * indemnify him from his responsibility as surety, and to secure him from his existing and future indorsements for the mortgagor at bank; and the mortgage was held valid against the claim of the United States, although the collector was, in point of fact, unable to pay all his debts at the time the mortgage was given; and although the mortgagee knew, when he took the mortgage, that the mortgagor was largely indebted to the United States.

Afterwards, in *Harrison* v. *Sterry*, (*a*) it was held that in the distribution of a bankrupt's effects, the United States were entitled to their preference, although the debt was contracted by a foreigner in a foreign country, and the United States had proved their debt under a commission of bankruptcy. Though the law of the place where the contract is made be, generally speaking, the law of the contract, yet the right of priority forms no part of the contract. The insolvency which was to entitle the United States to a preference was declared, in *Prince* v. *Bartlett*, (*b*) to mean a legal and known insolvency, manifested by some notorious act of the debtor, pursuant to law. This was giving to the world some reasonable and definite test by which to ascertain the existence of the latent and dangerous preference given by law to the United States. In this last case, the effects of an insolvent debtor, duly attached in June, were considered not to be liable to the claim of the United States, on a custom-house bond given prior to the attachment, and put in suit in August following. The private creditor had acquired a lien by his attachment, which could not be devested by process on the part of the United States subsequently issued. Nor will the lien of a judgment creditor, duly perfected, be displaced by

(*b*) U. S. *v.* Hooe, *sup.*; United States *v.* Clark, 1 Paine C. C. 629; United States *v.* Monroe, 5 Mason, 572; United States *v.* Hawkins, 16 Martin's Louisiana Rep. 317. In England a provisional assignment in bankruptcy will defeat the king's extent, if it precedes the test of the writ. King *v.* Crump, Parker, 126; Lord Eldon, 14 Vesey, 88. In the case of The United States *v.* McLellan, 3 Sumner, 345, it was held that a conveyance, by a known insolvent debtor, of all his property to one or more creditors, in discharge of their debts, not exceeding the amount due, and not for the benefit of any other creditors, was not a voluntary assignment within the act of 1799, so as to be affected by the priority of the United States.

(*a*) 5 Cranch, 289.

(*b*) 8 Cranch, 431, S. P.; United States *v.* Canal Bank, 3 Story C. C. 79.

the mere priority of the United States.[1] The word insolvency, in the acts of Congress of 1790, 1797, and 1799, means a legal insolvency; and a mere state of insolvency, or inability in a debtor to pay all his * debts, gives no right of preference * 247 to the United States, unless it be accompanied by a voluntary assignment of all the property, for the benefit of creditors, or by some legal act of insolvency. If, before the right of preference has accrued, the debtor has made a *bona fide* conveyance of his estate to a third person, or has mortgaged the same to secure a debt, or if the property has been seized under an execution, the property is devested from the debtor, and cannot be made liable to the United States. (*a*)

(*a*) Thelusson *v.* Smith, 2 Wheaton, 399; Conard *v.* The Atlantic Insurance Company, 1 Peters U. S. 386; Brent *v.* Bank of Washington, 10 Peters U. S. 596. The priority of the United States does not affect any *lien*, general or specific, existing when the event took place, which gave the United States a claim of priority, nor prevent the transmission of the property to assignees, executors, and administrators subject to the lien. — Ib.[1] In England, in the case of Giles *v.* Grover, before the House of Lords, (9 Bing. 128,) it was decided, after a most elaborate discussion, in conformity with the opinions of a majority of the twelve judges, that the goods of a debtor, already seized under a *fi. fa.* at the suit of a subject, but not sold, might be taken under a writ of extent for a debt of the crown, and which writ of extent was tested after the seizure under the *fi. fa.* The seizure under the *fi. fa.* was considered as not devesting the debtor of his general property in the goods seized, or in any manner altering the property, and that no property was thereby acquired therein by the execution creditor, or by the sheriff. The claims of the crown and the subject on the goods were held to stand in equal degree, and the two executions to be in effect concurrent; and in such cases the king's prerogative had the preference. *Quando jus Domini Regis et subditi insimul concurrunt jus regis præferri debet.* (9 Co. 120, b.) The sheriff had the legal custody of the goods, and a special property in them by virtue of the seizure, for the purpose of protection and sale; but until the sale, which was the dividing line as to the ownership of the goods, the absolute property of the debtor was not altered or devested. The priority of the government claims in this country is not carried to that extent, according to the opinion of Judge Washington, in Thelusson *v.* Smith; but it is to be observed, that the observation of Judge Washington was a mere *dictum*, and not a turning-point in the case. The same remark applies to what was said by the judge who delivered the opinion of the court in Conard *v.* The Atlantic Insurance Company; for the *dictum* was quoted in the course of the opinion incidentally, and without any criticism upon it, or particular attention to it. In Hoke *v.* Henderson, 3 Dev. (N. C.) 17, Judge Ruffin considered the prerogative of the sovereign as to priority equally applicable here as in England, and that it went to the extent claimed in the above case of Giles *v.* Grover. On the other hand, in Wilcocks *v.* Waln, 10 Serg. & Rawle, 380, and in United States *v.* Mechanics' Bank, Gilpin, 51, it

[1] United States *v.* Canal Bank, 3 Story C. C. 79.

[1] See United States *v.* Duncan, 4 McLean, 607; S. C. 12 Ill. 523.

The United States have, accordingly, a preference as creditors, to the extent above declared, in four cases, viz.: (1.) In the case

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was held, that the priority of the United States gave no lien on property *seized* under a *fieri facias*, when the lien accrued, for the debtor was devested of the property. A very much contested question has been raised and discussed in the courts in this country, on the conflicting claims of a judgment or attaching creditor under state laws, and the assignee under the bankrupt law of the United States. It was declared and adjudged by Mr. Justice Story, in the Circuit Court of the United States, in Massachusetts, and by Mr. Justice Ware, in the District Court of Maine, that an attachment under a state law was not an absolute lien, but a contingent one, dependent upon a subsequent judgment in the attaching suit; and that a bankrupt's discharge upon a petition in bankruptcy, filed after the attachment and during the process of such suit, would be a bar to the recovery of any judgment thereon, and that the lien created by the attachment must give way and becomes avoided, and the debt also, by the *subsequent* decree and discharge in bankruptcy. Ex parte Foster, 2 Story C. C. 131; In the Matter of Cook, 2 Story C. C. 376; In the Matter of Bellows & Peck, 3 Story C. C. 428; Smith *v.* Gordon, 6 Law Reporter, 313; Everett *v.* Stone, 3 Story C. C. 447. The courts of the United States, and several of the state courts, maintain a different doctrine. The doctrine is, that a creditor, by his suit in equity, commonly called a creditor's bill, on his unsatisfied judgment, thereby acquires an equitable lien, and which operates as an attachment of property, and creates a right to priority of payment as against the assignee of a bankrupt, under a petition in bankruptcy *subsequently* made. That such a lien was not devested by a decree in bankruptcy, upon a petition filed subsequent to the commencement of a chancery suit, or the levy of the attachment. That the assignee in such a case takes the debtor's property subject to the creditor's lien, even independent of the proviso in the bankrupt act, and upon general principles applicable to insolvency and bankruptcy in this country and in England. That the assignee of the bankrupt or insolvent takes only such rights, and subject to such equities as belonged to the bankrupt himself at the time of the bankruptcy. That the judgment creditor had also a lien, upon the true construction of the proviso in the 2d section of the bankrupt law, paramount to the claim of the assignee, and as strong upon this proviso as upon general principles of law, for the word *securities* reaches all mortgages and liens, and they may be enforced in the state courts. The attachment is a lien, and the creditor's bill a lien within the proviso, and the property of the bankrupt was not devested until the decree in bankruptcy. The decisions in the Circuit Courts of the U. States in Vermont, New Jersey, and Pennsylvania, and of the District Courts of Vermont, and of Northern New York, and of several of the state courts, are all cited in support of this doctrine, by the Ass't Vice-Ch. of New York, in the case of Storm *v.* Waddell, 3 N. Y. Legal Observer, 367, S. C. 2 Sandf. Ch. 494, and which case is distinguished for its learning and ability, and its logical vindication of the doctrine. The two cases of Kittredge *v.* Warren, and of Kittredge *v.* Emerson, decided in the Supreme Court of New Hampshire, in the year 1844, and in which the judgment of the court was delivered by Mr. Ch. Justice Parker, are equally worthy of special notice for their learned research, and powerful, if not irresistible, deductions.[2] See, also, Doremus *v.* Walker, Ala. (N. S.) vol. viii. p. 194, and Mabry *v.* Herndon,

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[2] The doctrine of the New Hampshire courts has been finally established in the Supreme Court of the United States. Peck *v.* Jenness, 7 How. U. S. 612. Id. 626. See Kittredge *v.* Warren, 14 N. Hamp. 509; Kittredge *v.* Emerson, 15 N. Hamp. 227.

of the death of the debtor without sufficient assets; (2.) bankruptcy, or legal insolvency, manifested by some act pursuant to law; (3.) a voluntary assignment by the insolvent of all his property to pay his debts; (4.) in the case of an absent, concealed, or absconding debtor, whose effects are attached by process of law. The priority was intended to operate only where, by law, or by the act of the debtor, his property was sequestered for the use of his creditors; and it is proper that this prerogative right of the United States should be strictly construed and precisely defined, for it is in derogation of the general rights of creditors. (*b*)

The government was a privileged creditor, under the Roman law, and entitled to priority in the payment of debts. The *cessio bonorum* was made subject to this priority. This is generally the case, in all modern bankrupt and insolvent laws. In England, the king's claim is preferred to that of a subject, provided the king's process was commenced before the subject had obtained

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Id. 848, to the S. P., and in favor of the right of the state courts to inquire into the validity of a discharge upon the allegation that the bankrupt did not render a true inventory of his property, but fraudulently concealed the same.

(*b*) Watkins *v.* Otis, 2 Pick. 102. The priority given by law to the United States does not extend to the real estate, or the proceeds of the real estate, belonging to or vested in the heirs of the debtor. The priority does not attach *as against the heir*, but only when the real estate, or the proceeds thereof, passes to, or is vested by law in the hands of an assignee of an insolvent debtor, or his executors or administrators. United States *v.* Crookshank, 1 Edw. Ch. 233. It does not extend so as to take the property of a partner in partnership effects, to pay the separate debt of such partner, when the partnership effects are not sufficient to satisfy the creditors of the partnership. United States *v.* Hack, 8 Peters U. S. 271. It does not extend so as to reach the allowance made by the judge of probate to the widow of the deceased debtor, under the law of distribution of intestates' estates. Postmaster-General *v.* Robbins, Ware Adm. 165. It does not extend to a surety to a custom-house bond, so as to entitle him, after paying the debt, to be subrogated to the rights of the United States as against his co-surety, or to give his demand for contribution a preference over other creditors. Pollock *v.* Pratt & Harvey, 2 Wash. C. C. 490. But this priority, as given by the statute of 1797, applies to *equitable* as well as legal debts. Howe *v.* Sheppard, 2 Sumner, 133. It was further held, in Beaston *v.* Farmers' Bank of Delaware, 12 Peters U. S 102, that no lien was created by the statute of March 3d, 1797, and that the priority established by it could never attach, while the debtor continues the owner and in possession of the property, though he be unable to pay his debts, — that no evidence of his insolvency can be received, until he has been devested of his property; and when thus devested, the person who takes the title becomes a trustee for the United States. See Conkling's Treatise, 2d edit. 469–476, for a condensed view of the statutes and judicial decisions on this question of priority asserted by the United States.

judgment. (*c*) As to the fiscal lien of the government of
*248 the United States, it *was held in *Harris* v. *Dennie*, (*a*) that the government had a lien on goods imported, for the payment of dues accruing on them, and not secured by bond; and that the United States were entitled to the custody of the goods until the duties were paid or secured; and any attachment of the goods under state process, during such custody, was void. On the other hand, it was held, that the government had no general lien on the goods of the importer, for duties due by him upon other importations. (*b*)

(*c*) Stat. Hen. VIII. c. 39.

(*a*) 3 Peters U. S. 292.

(*b*) In Maryland, by statute, passed in 1778, the commencement of a suit *by the state* against a public debtor created a lien on the lands of the debtor, and a preference over all other creditors, who had not, prior to the commencement of the suit, secured a lien by judgment, mortgage, or otherwise. Davidson *v.* Clayland, 1 Harr. & Johns. 546. The preference in payment of debts was a branch of government prerogative at common law, and it was introduced as such into Maryland. It is the law still, where the property of the debtor remains in hand, and there is no lien standing in the way. State of Maryland *v.* Bank of Maryland, 6 Gill & John. 205. In Connecticut, the state has a priority of claim against the estate of an insolvent debtor; and state sureties paying the debt have the same privilege. Revised Statutes of Connecticut, 1826, p. 212. The state preference rests, in this country, upon statutes; and the common law gives none over other creditors. The State *v.* Harris, 2 Bailey S. C. 598. Keckley *v.* Keckley, 2 Hill Ch. (S. C.) 256. The common-law prerogative of the king, to be paid in preference to all other creditors, is therefore not universally adopted in this country. It prevails in the government of the United States, and in Maryland, North Carolina, Indiana, Connecticut, &c., but not in South Carolina. In Georgia, state taxes have preference over all encumbrances whatsoever. State *v.* Pemberton, Dudley, 15. In Indiana, the state has preference of all other creditors; and real and personal estate is bound on behalf of the state from the teste of the first process. Rev. Stats. 1838, p. 283.

As to the lien of judgments obtained by individuals in the federal courts, it was decided in the Circuit Court of the United States, in New York, in November, 1829, in the case of Konig *v.* Bayard,[1] that judgments in the Circuit and District Courts in New York were a lien upon lands as against subsequent purchasers, from the time they were regularly docketed, according to the practice of those courts, and that the usage of docketing those judgments had prevailed since 1795. The same doctrine was assumed in reference to judgments in the federal courts in Pennsylvania, in the case of Conard *v.* Atlantic Ins. Co., 1 Peters U. S. 386; and the principles contained in this last case were reviewed and confirmed in Conard *v.* Nicoll, 4 Peters U. S. 291. The same rule as to judgments in the Circuit Court of the United States in Ohio. Sellers *v.* Corwin, 5 Ham. 400. There is no act of Congress making judgments in the United States courts a lien on lands. Such a lien depends upon the local laws of the state where the land lies. Tayloe *v.* Thomson, 5 Peters U. S. 358.

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[1] Konig *v.* Bayard, 2 Paine C. C. 251.

(2.) The next case which called forth a construction from every part of the government as to the implied powers of Congress, was, whether Congress had power to incorporate a bank. In the year 1791, the Secretary of the Treasury had recom- Congress may create a bank.

In New York, therefore, a judgment in one of the federal courts within that state is a lien upon the lands of the debtor within the state, for the term of ten years from the docketing of the judgment. The Manhattan Company *v.* Evertson, 6 Paige, 457. Indeed, in every state, the judgments of the federal courts have the same lien, to the extent of their jurisdiction, as the judgments of the highest court of the state. Den *v.* Jones, 2 McLean, 78, 83.[2]

Debtors to the United States for moneys received, their executors and administrators, &c., omitting, on due notice, to render to the Auditor of the Treasury their accounts and vouchers for the expenditure of such moneys, are to be sued under the direction of the Comptroller of the Treasury, and are to be subject to the costs and charges of such suits, *whether the ultimate decision be in their favor or against them.* (Act of Congress, March 3d, 1795, c. 113.) So receivers of public moneys, including all public officers, who shall fail to account and pay over the same, they and their sureties *may be proceeded against forthwith by warrant of distress*, and have their goods and chattels seized and sold, and if not sufficient, they may be imprisoned. The amount due is a lien on the real estate from the time of the levy of the distress warrant; and for want of sufficient goods and chattels, the lands may be sold on three weeks' notice, and a conveyance executed to the purchaser by the marshal. (Act of Congress, *sup.* sec. 3, and act of May 15th, 1820, sec. 2, 3.)[3] Any person aggrieved by the distress may apply by bill to the district judge for relief under the process of injunction, and if still unredressed, he may appeal to the Circuit Court. (Act of Congress, 15th May, 1820, sec. 4, 6.) He may also, if in prison, be relieved upon *habeas corpus* by the Circuit Court of the United States. (United States *v.* Nourse, 9 Peters U. S. 8; Id. p. 12, note.) The doctrines of the government and courts of the United States are quite stringent in respect to the obligations of importers of goods. The import duty is held to be a personal debt chargeable upon the importer, as well as a lien on the goods themselves, and that the personal debt continues, though the goods be deposited with a bond given for the duties, and the goods be lost or destroyed. Meredith *v.* United States, 13 Peters U. S. 486, 494. Another part of that case wears the same forbidding aspect. The enforcement of fines, penalties, or forfeitures, under the revenue laws of the United States, is extremely strict and rigorous; but the act of Congress of March 3d, 1797, sec. 1, made perpetual by act of Feb. 11, 1800, authorizes the Secretary of the Treasury, on application, to mitigate or remit the penalties of these

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[2] Lombard *v.* Bayard, 1 Wallace Jr. C. C. 196; Byers *v.* Fowler, 7 Engl. 218; Simpson *v.* Niles, 1 Carter, 196; Pollard *v.* Cocke, 19 Ala. 188. The lien of a judgment rendered in the Circuit Court is not necessarily extended during the pendency of a writ of error in the Supreme Court. Chouteau *v.* Nuckolls, 20 Mis. 442.

[3] But see Ex parte Randolph, 2 Brock. (Va.) 447, 477–480; United States *v.* Hoyt, 10 How. U. S. 109.

Summary proceedings by warrant of distress under the act of 1820 do not conflict with the constitutional provision, that no man shall be deprived of his property without due process of law. They fall within a legitimate exercise of the executive power. Murray's Lessee *v.* Hoboken L. & I. Co. 18 How. U. S. 272.

mended the institution of a national bank, as being of primary importance to the prosperous administration of the finances, and of the greatest utility in the operations connected with the support of public credit. But the bill for establishing a bank was opposed in the House of Representatives, as not authorized by the constitution. It was contended that the government of the United
* 249 * States was limited to the exercise of the enumerated powers, and that the power to incorporate a bank was not one of them, and, if vested in the government, it must be an implied power; and it was contended, that the power given to Congress to pass all laws necessary and proper to execute the specified powers must be limited to means necessary to the end, and incident to the nature of the specified powers. On the other hand, it was urged in favor of the bill, that incidental, as well as express powers, necessarily belonged to every government, and that when a power was delegated to effect particular objects, all the known and usual means of effecting them passed as incidental to them; and it was insisted that a bank was a known and usual instrument, by which several of the enumerated powers of government were exercised. After the bill had passed the two houses of Congress, the question touching its constitutionality was agitated with equal ability and ardor in the executive cabinet. The Secretary of State and the Attorney-General conceived that Congress had transcended their powers, but the Secretary of the Treasury maintained the opposite opinion. Their respective opinions were founded on a train of reasoning, denoting great investigation of all the leading and fundamental principles of the constitution, and they were submitted to the consideration of the President of the United States. It was argued against the constitutionality of the act, that the power to incorporate a bank was not among the enumerated powers, and to take a single step beyond the boundaries specially drawn around the powers of Congress would be to take possession of an undefined and undefinable field of power; that though Congress were authorized to make all laws necessary and proper for carrying into execution the enumerated powers, they were confined to those means which were necessary, and not merely convenient. It meant those means without which the grant of the power would

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laws, when, from the facts of the case, first judicially ascertained, he should be of opinion that such penalties have been incurred *without wilful negligence, or any intention of fraud.*

be nugatory, and that if such a latitude of construction were allowed, as to give to Congress any implied power on the ground of convenience, * it would swallow up all the list * 250 of enumerated powers, and reduce the whole to one phrase.

On the other hand, it was contended that every power vested in a government was, in its nature, sovereign, and gave a right to employ all the means fairly applicable to the attainment of the end of the power, and not specially precluded by specified exceptions, nor contrary to the essential ends of political society; that though the government of the United States was one of limited and specified powers, it was sovereign with regard to its proper objects, and to its declared purposes and trusts; that it was incident to sovereign power to erect corporations, and, consequently, it was incident to the United States to erect one, in relation to the objects intrusted to its management; that implied powers are as completely delegated as those which are expressed, and the power of erecting a corporation may as well be implied as any other instrument or means of carrying into execution any of the specified powers; that the exercise of the power in that case had a natural relation to the lawful ends of the government, and it was incident to the sovereign power to regulate, and to employ all the means which apply with the best advantage to that regulation; that the word *necessary*, in the constitution, ought not to be confined to those means, without which the grant of power would be nugatory, and it often means no more than needful, requisite, useful, or conducive to, and that was the true sense in which the word was used in the constitution. The relation between the measure and the end was the criterion of constitutionality, and not whether there was a greater or less necessity or utility. The infinite variety, extent, and complexity of national exigencies necessarily required great latitude of discretion in the selection and application of means; and the authority intrusted to government ought to and must be exercised on principles of liberal construction.

President Washington gave these arguments of his cabinet a deliberate and profound consideration, and it * ter- * 251 minated in a conviction, that the incorporation of a bank was a measure authorized by the constitution, and the bill passed into a law.

This same question came before the Supreme Court of the

United States, in 1819, in the case of *M'Culloch* v. *The State of Maryland*, (*a*) in reference to the Bank of the United States, which was incorporated in 1816, and upon which the legislature of Maryland had imposed a tax. Notwithstanding the question arising on the construction of the powers of Congress had been settled, so far as an act of Congress could settle it, in 1791, and again in 1816, it was thought worthy of a renewed discussion in that case. The chief justice, in delivering the opinion of the court, observed, that the question could scarcely be considered an open one, after the principle had been so early introduced and recognized by many successive legislatures, and had been acted upon by the judicial department, as a law of undoubted obligation. He admitted that it belonged to the Supreme Court alone to make a final decision in the case, and that the question involved a consideration of the constitution in its most interesting and vital parts.

It was admitted, that the government of the United States was one of enumerated powers, and that it could exercise only the powers granted to it; but though limited in its powers, it was supreme within its sphere of action. It was the government of the people of the United States, and emanated from them. Its powers were delegated by all, and it represented all, and acted for all. In respect to those subjects on which it can act, it must necessarily bind its component parts; and this was the express language of the constitution, when it declared that the constitution, and the laws made in pursuance thereof, were the supreme law of the land and required all the officers of the state governments to take an oath of fidelity to it. There was nothing
* 252 * in the constitution which excluded incidental or implied powers. The articles of the confederation gave nothing to the United States but what was expressly granted; but the new constitution dropped the word *expressly*, and left the question, whether a particular power was granted, to depend on a fair construction of the whole instrument. No constitution can contain an accurate detail of all the subdivisions of its powers, and of all the means by which they might be carried into execution. It would render it too prolix. Its nature requires that only the great outlines should be marked, and its important objects designated, and all the minor ingredients left to be deduced from the

(*a*) 4 Wheaton, 316.

nature of those objects. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, were intrusted to the general government; and a government intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation vitally depended, must also be intrusted with ample means for their execution. Unless the words imperiously required it, we ought not to adopt a construction which would impute to the framers of the constitution, when granting great powers for the public good, the intention of impeding their exercise, by withholding a choice of means.

The powers given to the government imply the ordinary means of execution; and the government, in all sound reason and fair interpretation, must have the choice of the means which it deems the most convenient and appropriate to the execution of the power. The power of creating a corporation, though appertaining to sovereignty, was not a great, substantive, and independent power, but merely a means by which other objects were accomplished; in like manner, as no seminary of learning is instituted in order to be incorporated, but the corporate charter is conferred to subserve the purposes of education. The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else. It is nothing but ordinary
* means to attain some public and useful end. The con- * 253
stitution has not left the right of Congress to employ the necessary means for the execution of its powers to general reasoning. It is expressly authorized to employ such means; and *necessary* means, in the sense of the constitution, does not import an absolute physical necessity, so strong that one thing cannot exist without the other. It stands for any means calculated to produce the end. The word necessary admits of all degrees of comparison. A thing may be necessary, or very necessary, or absolutely and indispensably necessary. The word is used in various senses, and in its construction, the subject, the context, the intention, are all to be taken into view. The powers of the government were given for the welfare of the nation. They were intended to endure for ages to come, and to be adapted to the various crises of human affairs. To prescribe the specific means by which government should in all future time execute its power, and to confine the choice of means to such narrow limits as should

not leave it in the power of Congress to adopt any which might be appropriate and conducive to the end, would be most unwise and pernicious, because it would be an attempt to provide by immutable rules for exigencies which, if foreseen at all, must have been seen dimly, and would deprive the legislature of the capacity to avail itself of experience, or to exercise its reason, and accommodate its legislation to circumstances.

If the end be legitimate, and within the scope of the constitution, all means which are appropriate and plainly adapted to this end, and which are not prohibited, are lawful; and a corporation was a means not less usual, nor of higher dignity, nor more requiring a particular specification, than other means. A national bank was a convenient, a useful, and essential instrument in the prosecution of the fiscal operations of the government. It was clearly an appropriate measure; and while the Supreme Court declared it to be within its power and its duty to maintain that an act * of Congress exceeding its power was not the * 254 law of the land, yet if a law was not prohibited by the constitution and was really calculated to effect an object intrusted to the government, the court did not pretend to the power to inquire into the degree of its necessity. That would be passing the line which circumscribes the judicial department, and be treading on legislative ground.

The court therefore decided, that the law creating the Bank of the United States was one made in pursuance of the constitution; and that the branches of the national bank, proceeding from the same stock, and being conducive to the complete accomplishment of the object, were equally constitutional.

The Supreme Court were afterwards led, in some degree, to review this decision, in the case of *Osborn* v. *The United States Bank;* (*a*) and they there admitted that Congress could not create a corporation for its own sake, or for private purposes. The whole opinion of the court in the case of *M'Culloch* v. *The State of Maryland* was founded on, and sustained by, the idea, that the bank was an instrument which was necessary and proper for carrying into effect the powers vested in the government. It was created for national purposes only, though it was undoubtedly capable of transacting private as well as public business; and while it was

(*a*) 9 Wheaton, 859, 860.

the great instrument by which the fiscal operations of the government were effected, it was also trading with individuals for its own advantage. The bank, on any rational calculation, could not effect its object, unless it was endowed with the faculty of lending and dealing in money. This faculty was necessary to render the bank competent to the purposes of government, and, therefore, it was constitutionally and rightfully engrafted on the institution. (*b*)

(3.) The construction of the powers of Congress relative to taxation was brought before the Supreme Court, in 1796, in the case of *Hylton* v. *The United States*. (*a*) By the act of * 5th June, 1794, Congress laid a duty upon * 255 carriages for the conveyance of persons, and the question

Rules for taxation.

(*b*) It is worthy of notice, that the power of Congress to establish a national bank, even under the articles of confederation, seems not, at the time, to have been much questioned; and Congress did actually approve of such a proposition on the 26th of May, 1781; and on the 31st of December following, they proceeded by ordinance to institute and incorporate the Bank of North America. Journals of Congress, vol. vii. pp. 87, 197. The constitutionality and validity of this ordinance were ably enforced by Judge Wilson. See Wilson's Works, vol. iii. p. 397, and see *supra*, p. 212, n. The first and the second banks of the United States were established by statutes which received the approbation of Presidents Washington and Madison, and the constitutionality of the establishment of those banks being repeatedly declared by the Supreme Court of the United States, it was considered as a settled question, not open for further discussion. The constitution declared, that "all *legislative powers* therein granted should be vested in the Congress of the United States"; and that "the *executive power* should be vested in a President of the United States; and that the *judicial power* of the United States should be vested in one Supreme Court, and in such inferior courts as the Congress might from time to time ordain and establish; and that *the judicial power should extend to all cases in law and equity arising under the constitution.*" (Art. 1, sec. 1; Art. 2, sec, 1; Art. 3, sec. 1, 2.) This simple and beautiful distribution of power would seem to be too clear to be mistaken, and too sacred to be invaded. The oath to support the constitution necessarily includes, in its meaning and efficacy, the support of this distribution of power, and of the judicial cognizance of all cases arising under the constitution. That cognizance extends, of course, to the question whether Congress have the constitutional power to incorporate a national bank. It is *a case arising under the constitution;* and the decisions of the Supreme Court are in favor of the existence of such a power, and of the valid exercise of it in the establishment of a national bank. The words *necessary and proper* in the constitution, were not to be confined to means that were *indispensable* in the exercise of any express power; but extended to all means that Congress should deem *expedient and useful*, and conducive to the end proposed in the execution of any express power. That construction is binding and conclusive, as well upon the other departments of the government as upon the nation at large. The Congress, in whom is vested the legislative power, and the President, in whom is vested the executive power, are respectively bound to receive and obey that construction of the constitution which has been duly settled by the judicial power. See, further, *infra*, pp. 449, 456, note *b*.

(*a*) 3 Dallas, 171.

was whether this was a *direct* tax, within the meaning of the constitution. If it was not a direct tax, it was admitted to be rightly laid, under that part of the constitution which declares that all duties, imposts, and excises shall be uniform throughout the United States; but if it was a direct tax, it was not constitutionally laid, for it must then be laid according to the census, under that part of the constitution which declares that direct taxes shall be apportioned among the several states according to numbers. The Circuit Court in Virginia was divided in opinion on the question; but on appeal to the Supreme Court, it was decided, that the tax on carriages was not a direct tax, within the letter or meaning of the constitution, and was therefore constitutionally laid.

The question was deemed of very great importance, and was elaborately argued. It was held that a general power was given to Congress to lay and collect taxes of every kind or nature, without any restraint. They had plenary power over every species of taxable property, except exports. But there were two rules prescribed for their government: the rule of uniformity, and the rule of apportionment. Three kinds of taxes, viz. duties, imposts, and excises, were to be laid by the first rule; and capitation, and other direct taxes, by the second rule. If there were any other species of taxes, as the court seemed to suppose there might be, that were not direct, and not included within the words duties, imposts, or excises, they were to be laid by the rule of uniformity or not, as Congress should think proper and reasonable.

The constitution contemplated no taxes as direct taxes, but such as Congress could lay in proportion to the census; and the rule of apportionment could not reasonably apply to a tax on carriages, nor could the tax on carriages be laid by that rule, without very great inequality and injustice. If two states, equal in census, were each to pay 8,000 dollars, by a tax on carriages,
*256 *and in one state there were 100 carriages, and in another 1,000, the tax on each carriage would be ten times as much in one state as in the other. While A, in the one state, would pay for his carriage eight dollars, B, in the other state, would pay for his carriage eighty dollars. In this way, it was shown by the court, that the notion that a tax on carriages was a direct tax, within the purview of the constitution, and to be

apportioned according to the census, would lead to the grossest abuse and oppression. This argument was conclusive against the construction set up, and the tax on carriages was considered as included within the power to lay duties; and the better opinion seemed to be, that the direct taxes contemplated by the constitution were only two, viz. a capitation, or poll tax, and a tax on land. The court concluded that the tax on carriages was an indirect tax on expense or consumption, and, therefore, properly laid, pursuant to the rule of uniformity.

In *Loughborough* v. *Blake*, (*a*) the power of taxation was again brought under judicial discussion. The question was immediately of a local nature, and it was, whether Congress had the right to impose a direct tax upon the unrepresented District of Columbia. But there were principles involved in the decision which had an extensive and important relation to the whole United States.

It was declared that the power to tax extended equally to all places over which the government extended. It extended as well to the District of Columbia, and to the territories which were not represented in Congress, as to the rest of the United States. Though duties were to be uniform, and taxes were to be apportioned according to numbers, the power was coextensive with the empire. The inhabitants of the then territories of Michigan, and of Florida, and Arkansas, for instance, as well as the District of Columbia, though without any representation in Congress, were subject to the * full operation of the power of taxa- * 257 tion, equally as the people of New York or Massachusetts. But the court held, that Congress are not bound to, though they may, in their discretion, extend a direct tax to the territories as well as to the states. A direct tax, if laid at all, must be laid on every state conformably to the census, and therefore Congress has no power to exempt any state from its due share of the burden. But it was understood that Congress were under no necessity of extending a tax to the unrepresented District of Columbia, and to the territories; though, if they be taxed, then the constitution gives the rule of assessment. This construction was admitted to be most convenient, for the expense of assessing and collecting a tax in a territory, as the Northwest Territory, for instance, then

(*a*) 5 Wheaton, 317.

existed, might exceed the amount of the tax. Here was an anomalous case in our government, in which representation and taxation were not inseparable, though the principle that the power of taxation could not rightfully exist without representation, was a fundamental ground of our Revolution. The court did not consider a departure from a general principle, in this case, to be very material or important, because the case was that of territories which were in a state of infancy, advancing to manhood, and looking forward to complete equality, as soon as that state of manhood should be attained. It was the case, also, of the District of Columbia, which had voluntarily relinquished the right of representation, and adopted the whole body of Congress for its legitimate government.

Right of domain as to Indian land.

(4.) Congress have the exclusive right of pre-emption to all Indian lands lying within the territories of the United States. This was so decided in the case of *Johnson* v. *M'Intosh*. (*a*) Upon the doctrine of the court in that case, and in that of *Fletcher* v. *Peck*, (*b*) the United States own the soil, as well as the jurisdiction of the immense tracts of unpatented lands included within their territories, and
* 258 of * all the productive funds which those lands may hereafter create. The title is in the United States by the treaty of peace with Great Britain, and by subsequent cessions from France and Spain, and by cessions from the individual states; and the Indians have only a right of occupancy, and the United States possess the legal title, subject to that occupancy, and with an absolute and exclusive right to extinguish the Indian title of occupancy, either by conquest or purchase. The title of the European nations, and which passed to the United States, to this immense territorial empire, was founded on discovery and conquest; and, by the European customary law of nations, prior discovery gave this title to the soil, subject to the possessory right of the natives, and which occupancy was all the right that European conquerors and discoverers, and which the United States, as succeeding to their title, would admit to reside in the native Indians. The principle is, that the Indians are to be considered merely as occupants, to be protected while in peace in the possession of their lands, but to be deemed incapable of trans-

(*a*) 8 Wheaton, 543. (*b*) 6 Cranch, 142, 143.

ferring the absolute title to any other than the sovereign of the country. The constitution (*a*) gave to Congress the power to dispose of, and to make all needful rules and regulations respecting, the territory or other property belonging to the United States, and to admit new states into the Union. Since the constitution was formed, the value and efficacy of this power have been magnified to an incalculable extent, by the purchase of Louisiana and Florida; and, under the doctrine contained in the cases I have referred to, Congress have a large and magnificent portion of territory under their absolute control and disposal. This immense property has become national and productive stock, and Congress, in the administration of this stock, have erected temporary governments under the provisions of the ordinance of the Congress under the confederation, and under the constitutional power; and they have appointed the officers to each territory, and allowed delegates in Congress to be chosen by the * inhabitants *259 every second year, and with a right to debate, but not to vote, in the House of Representatives. (*a*)

The unpatented lands belonging to the United States, within the states of Ohio, Indiana, Illinois, Michigan, and the territory of Wisconsin, arose from cessions from the states of Virginia, Massachusetts, Connecticut, and New York, before the adoption

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(*a*) Art. 4, sec. 3.

(*a*) Ordinance of Congress of 18th July, 1787. Acts of Congress of August 7th, 1789; January 14th, 1805; March 3d, 1817; February 16th, 1819; April 24th, 1820; March 30th, 1822. The acquisition of the foreign territories of Louisiana and Florida by the United States, by purchase, was to be supported only by a very liberal and latitudinary construction of the incidental powers of the government under the constitution. The objections to such a construction, which were urged at the time, are stated in 3 Story's Comm. 156 – 161. But the constitutionality of the acquisition of foreign territory is vindicated, established, and settled by the Supreme Court, as one necessarily flowing from the power of the Union to make treaties. American Ins. Co. *v.* Canter, 1 Peters U. S. 511. It belongs, therefore, upon that principle, exclusively to the President, with the advice and consent of two thirds of the members of the Senate present, to make the acquisition. But in 1845, Congress, by joint resolution, under the power in the constitution, (art. 4, sec. 3,) that "new states may be admitted by the Congress into this Union," admitted the foreign and independent State of Texas into the Union as a separate State, upon terms to which Texas afterwards acceded. Resolution of Congress of March 1, 1845. This was giving a new legislative construction, of enormous efficacy and extent, to the constitutional power to acquire foreign states, and would appear to be contrary to the principle of construction recognized by the Supreme Court, that the annexation of foreign states, out of the limits of the United States, must be the act of the treaty-making power.

of the present constitution of the United States. (*b*) North Carolina, South Carolina, and Georgia made similar cessions of their unpatented lands, and which now compose the states of Tennessee, Alabama, and Mississippi. The lands so ceded were intended to be, and were considered, as constituting a common fund, for the benefit of the Union; and when the states in which the lands are now situated were admitted into the Union, the proprietary right of the United States to those unimproved and unsold lands was recognized. Those lands belong to the United States, as part of their public domain, subject to the Indian right and title of occupancy, in all cases in which the same has not been lawfully extinguished. It is not to be concealed, however, that the title of the United States to the unappropriated lands lying within the limits of the separate states has been seriously questioned by some of them, as by Mississippi, Illinois, and Indiana. The latter state, in January, 1829, advanced a claim to the exclusive right to the soil and eminent domain of all the unappropriated lands within her acknowledged boundaries; and in 1830, Mississippi put forth a similar claim. But the cessions of the territorial claims of the separate states to the western country were called for by the Resolutions of Congress of the 6th September and 10th of October, 1780, and were made upon the basis that they were to be "disposed of for the common benefit of the United States." (*c*) It was stipulated by Congress, in the last Resolution, that the lands to be ceded should be disposed of for the common benefit of the United States; be settled and formed into distinct republican states, with a suitable extent of territory; become members of the American Union, and have the

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(*b*) That of New York was made March 1st, 1781, under the authority of the act of the legislature of that state, of the 19th February, 1780. That of Virginia was made March 1st, 1784, under the authority of an act of the 20th December, 1783. That of Massachusetts, on the 19th of April, 1785, under the authority of the acts of that state, of 13th November, 1784, and 17th March, 1785; and that of Connecticut, on the 14th September, 1786, under the authority of an act of that state of May, 1786. That of South Carolina, in August, 1787. The title to the lands belonging to the United States *west of the Mississippi* is supported by treaties made with Great Britain, in 1783, 1818, 1827; and with France, in 1803, and with Spain, in 1820, and with Mexico, in 1831. *Vide* Elliott's American Diplomatic Code, Washington, 1834, 2 vols., which is a most valuable compilation of all the treaties down to that date, in which the United States have any interest.

(*c*) Journals of the Confed. Congress, vol. vi. pp. 123, 147; Ibid. vol. viii. pp. 256, 259; Ibid. vol. ix. p. 47; Ibid. vol. x. p. 92; Ibid. vol. xi. p. 160; Ibid. vol. xii. p. 92.

same rights of sovereignty, freedom, and independence as the other states. It was likewise provided by * the ordi- * 260 nance of July 13th, 1787, *for the government of the territory of the United States northwest of the river Ohio*, that the legislatures of the districts or new states to be erected therein should "never interfere with the primary disposal of the soil by the United States, in Congress assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the *bona fide* purchaser. (*a*) [1]

(5.) By the constitution of the United States, Congress were, by general laws, to prescribe the manner in which the public acts, records, and judicial proceedings of every state should be proved, and the effect thereof in every other state. In pursuance of this power, Congress, by the act of May 26th, 1790, provided the mode by which records and judicial proceedings should be authenticated, and then declared that they should have such faith and credit given to them in every court within the United States as they had by law or usage in the courts of the state from whence the records were taken.[2] Effect of public records.

(*a*) For disposing of the lands of the United States, numerous land offices have been established by acts of Congress in the states of Ohio, Indiana, Illinois, Missouri, Louisiana, Mississippi, Alabama, Michigan, and Arkansas, and in the territories of Wisconsin, Iowa, and Florida.[3] See Gordon's Digest of the Laws of the United States, 1837, pp. 321 – 389, in which all the statute provisions relative to the disposition of the public domain of the United States are collected, and clearly and neatly arranged and digested. By the act of Congress of September 4th, 1841, c. 16, ten per cent of the net proceeds of the sales of the public lands, to be made subsequent to the 31st of December, 1841, within the limits of the states of Ohio, Indiana, Illinois, Alabama, Missouri, Mississippi, Louisiana, Arkansas, and Michigan, were to be paid to those states respectively; and the residue of those net proceeds, subject to certain provisos, should be divided, half-yearly, among the twenty-six states of the Union, and the District of Columbia, and the territories of Wisconsin, Iowa, and Florida, according to their respective federal representative population, as ascertained by the last census, to be applied by the legislatures of the said states to such purposes as they should direct.

[1] Although the act of Congress, May 1, 1820, prohibits the purchase of lands on account of the United States, except by special law, yet the United States may acquire the legal title to land taken as the security of a debt. Neilson *v.* Lagow, 12 How. U. S. 98.

[2] By act of Congress of March 27th, 1804, (2 U. S. Statutes at Large, 299,) it was enacted that the provisions of the act of 1790 shall apply to the territories of the United States, and the countries subject to the jurisdiction of the United States.

[3] And in all the other domains of the United States which have since then either been erected into territories or admitted as states.

Under this act it was decided, in the case of *Mills* v. *Duryee*, (*b*) that if a judgment, duly authenticated, had, in the state court from whence it was taken, the faith and credit of the highest nature, viz. record evidence, it must have the same faith and credit in every other court.[1] It was declaring the effect of the record, to declare the faith and credit that were to be given to it.[2] The constitution intended something more than to make the judgments of state courts *prima facie* evidence only. It contemplated a power in Congress to give a conclusive effect to such judgments. A judgment is, therefore, conclusive in every other state, if a court of the particular state where it was rendered would hold it conclusive.[3] *Nil debet* is not a good plea in a suit on a judgment in another state, because not a good plea in such state. *Nul tiel record* is the proper plea in such a case. The same decision was followed in *Hampton* v. *M'Connel*, (*c*)
* 261 and the doctrine contained * in it may now be considered as the settled law of the land. It is not, however, to be understood that *nul tiel record* is, in all cases, the necessary plea; but any special plea may be pleaded which would be good to avoid the judgment in the state where it was pronounced. (*a*) And in *Mayhew* v. *Thatcher*, (*b*) the court would seem to imply

(*b*) 7 Cranch, 481.

(*c*) 3 Wheaton, 234; and in Wernwag *v.* Pawling, 5 Gill & Johns. 500.

(*a*) Shumway *v.* Stillman, 4 Cowen, 292.

(*b*) 6 Wheaton, 129. — In Thurber *v.* Blackbourne, 1 N. Hamp. 242, it was held, that *nil debet* was a good plea to debt on a judgment of another state when it did not appear by the record that the defendant had notice of the suit. And in Spencer *v.*

[1] The authenticating certificates are, according to their tenor, sufficient proof of the character and authority of the officers executing them. Hatcher *v.* Rocheleaw, 18 N. Y. 86.

[2] An action of debt will not lie against an administrator in one state, on a judgment obtained against a different administrator of the same intestate, appointed under the authority of another state. It seems there is no privity between the two administrators, and the judgment cannot be regarded as one *in rem* against the estate as a corporate unity. Stacy *v.* Thrasher, 6 How. U. S. 44, 60; McLean *v.* Meek, 11 How. U. S. 16.

[3] In an action upon a bond conditioned for the payment of a debt by instalments, the plaintiff recovered judgment in New Hampshire for the penalty, and execution was issued for the first instalment then due. A suit having been brought in Vermont on the judgment, it was *held* that the judgment did not create an absolute indebtedness, which would sustain an action of debt in the common form, or by setting forth the judgment, the execution, and the subsequent breaches. Dimmick *v.* Brooks, 21 Vermont, 569.

that a judgment in one state, founded on an attachment *in rem*, would not be conclusive evidence of the debt in other states,

Brockway, 1 Ham. (Ohio) 122; Holt *v.* Alloway, 2 Blackf. (Ind.) 108, and Hoxie *v.* Wright, 2 Vermont, 263, the judgment of another state, regularly obtained, when the defendant had been served with process, or had otherwise appeared, was held to be conclusive evidence of the debt. But the defendant must have had due notice to appear, and be subject to the jurisdiction of the court, or if a foreigner or non-resident, he must have actually appeared to the suit, or the judgment of another state will not be deemed of any validity.[1] This is a plain principle of justice, which pervades the jurisprudence of this and all other countries. Kilburn *v.* Woodworth, 5 Johns. 37; Aldrich *v.* Kinney, 4 Conn. 380; Bissell *v.* Briggs, 9 Mass. 462; Fisher *v.* Lane, 3 Wils. 297; Buchanan *v.* Rucker, 9 East, 192; Douglas *v.* Forrest, 4 Bing. 686, 702; Becquet *v.* MacCarthy, 2 Barn. & Adol. 951; Bruce *v.* Wait, 1 Mann. & Gr. 1; Pawling *v.* Bird, 13 Johns. 192; Earthman *v.* Jones, 2 Yerger, 484; Miller *v.* Miller, 1 Bailey (S. C.) 242; Benton *v.* Burgot, 10 Serg. & Rawle, 240; Rogers *v.* Coleman, Hardin, 413; Borden *v.* Fitch, 15 Johns. 121; Hall *v.* Williams, 6 Pick. 232; Bates *v.* Delavan, 5 Paige, 305; Bradshaw *v.* Heath, 13 Wendell, 407. See, also, *infra*, vol. ii. 120. The doctrine in Mills *v.* Duryee is to be taken with the qualification, that in all instances the jurisdiction of the court rendering the judgment may be inquired into, and the plea of *nil debet* will allow the defendant to show that the court had no jurisdiction over his person. It is only when the jurisdiction of the court in another state is not impeached, either as to the subject-matter or the person, that the record of the judgment is entitled to full faith and credit. The court must have had jurisdiction, not only of *the cause*, but of *the parties*, and in that case the judgment is final and conclusive. If the suit in another state was commenced by the attachment of property, the defendant may plead in bar, that no process was served on him, and that he never appeared, either in person or by attorney. Starbuck *v.* Murray, 5 Wendell, 148; Shumway *v.* Stillman, 6 Wendell, 447; Wilson *v.* Niles, 2 Hall (N. Y.) 358; Gleason *v.* Dodd, 4 Metcalf, 333; Story's Comm. on the Conflict of Laws, sec. 586 – 590; Rangely *v.* Webster, 11 N. H. Amp. 299.[2] But an important

[1] The notice must be such as the state giving it is competent to direct. Mere knowledge of the pendency of the suit is not sufficient. State tribunals have no authority beyond the limits of the state; *it seems* that notice served on a person resident in another state, and while he is within such state, will not render the foreign judgment binding upon him. Ewer *v.* Coffin, 1 Cush. 23. But where in an original suit the party has appeared and obtained judgment in his favor, his adversary may subject him to the appellate jurisdiction of the courts of the state, notwithstanding his personal absence therefrom, by giving such notice by publication or otherwise as the laws of the state prescribe. Nations *v.* Johnson, 24 How. U. S. 195.

[2] The record of a judgment obtained in another state is of itself *prima facie* evidence that the court possessed the jurisdiction which it assumed to exercise. Bank of United States *v.* Merchants' Bank, 7 Gill, 415; Ransom *v.* Wheeler, 12 Abbott's Pr. R. 139; and see Moulin *v.* Ins. Co. 4 Zabr. 222; and one who alleges a want of jurisdiction must show it upon the face of the record according to the law of the State where the judgment was rendered. Lapham *v.* Briggs, 1 Wms. (Vt.) 26. The defendant may plead that he was not served with process, Rathbone *v.* Terry, 1 R. I. 73; D'Arcy *v.* Ketchum, 11 How. U. S. 165; Noyes *v.* Butler, 6 Barb. (N. Y.) 613: and though the recital upon the record of an appearance by attorney is *prima facie* evidence of an appearance of the party in interest, Houston *v.* Dunn, 13 Tex. 476, it may be shown that the attor-

* 262 if the defendant * had not personal notice of the suit, so as to have enabled him to defend it.[1]

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distinction is here to be observed, that a proceeding by foreign attachment, and against garnishees to judgment and execution, if binding in the state, is conclusive everywhere as a proceeding *in rem* against movable property and debts attached or garnished; but the judgment is of no force against *the person* of the debtor who had not been served with process, or appeared in the foreign attachment, nor against his property in another jurisdiction. Cochran *v.* Fitch, 1 Sand. Ch. 142.[3] The process by attachment of property of, and of debts due to non-residents, or of persons absent from the jurisdiction, will subject the property attached to execution upon the judgment or decree founded on the process; but it is considered as a mere proceeding *in rem*, and not personally binding, or having any extra-territorial force or obligation. Story's Comm. on the Conflict of Laws. Ibid. sec. 568. Chew *v.* Randolph, Walker, Miss. 1. Over-

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ney appeared without authority. Sherrard *v.* Nevius, 2 Carter (Ind.) 241; Thompson *v.* Emmert, 15 Ill. 415; Bodurtha *v.* Goodrich, 3 Gray, 508; and see Pearce *v.* Olney, 20 Conn. 544; Wilcox *v.* Kassick, 2 Gibbs (Mich.) 165; Newcomb *v.* Peck, 17 Vermont, 302; Hindman *v.* Mackall, 3 Iowa, 170; Hall *v.* Williams, 6 Pick. 232.

The record of a judgment pronounced by an inferior tribunal, and which does not admit of authentication according to the law of the United States, has been held not conclusive within the constitutional provision. Taylor *v.* Barron, 10 Foster, 78: so of a judgment rendered by a justice of the peace in another state. Snyder *v.* Wise, 10 Barr, 157; Robinson *v.* Prescott, 4 N. Hamp. 450. The conflicting cases on this point are collected and reviewed in Phillips's Evidence, Edwards's edition, vol. ii. p. 420 *et seq.* But a judgment, valid by the laws of the state where it is pronounced, is entitled to full faith, though neither plaintiff nor defendant was at the time a resident of the state. Randolph *v.* Keiler, 21 Mis. 557; so is the probate of a will when certified conformably to the requirements of the act. Haile *v.* Hill, 13 Mis. 612; Balfour *v.* Chew 5 Martin (Louis.) N. S. 517; Ripple *v.* Ripple, 1 Rawle, 386; Allen *v.* Thaxter, 1 Blackf. (Ind.) 399.

In a suit in New York upon a judgment rendered there, a decree of a competent court of Connecticut, enjoining proceedings in that state upon the record, is conclusive evidence that the judgment was originally procured by fraud as set forth in the decree. Dobson *v.* Pearce, 2 Kernan, 156.

[1] A judgment recovered in one state may be pleaded in bar to an action for the same cause in another state; or if such suit be pending at the time of the recovery of the judgment, it may be pleaded in bar of the further maintenance of the first. Bank of North America *v.* Wheeler, 28 Conn. 433.

But in no case is a greater effect to be given to a judgment of another state than belongs to it in the state where it was rendered. Suydam *v.* Barber, 18 N. Y. 468.

[3] Whitney *v.* Walsh, 1 Cush. 29. See the case of The Globe, N. Dist. N. Y. Law Rep. February, 1851, p. 488, where the court was of opinion that a judgment *in rem*, rendered in pursuance of an act of Ohio, would be a nullity in other states, unless the owner of the vessel proceeded against appeared in the suit, or had due notice and opportunity to make a defence. See, also, The Velocity, N. Dist. of N. Y., reported in Law Rep. June, 1850, p. 61. But see the opinion of Mr. Justice Nelson, reversing the decree of the district judge in the case of The Globe. C. C. North Dist. N. Y. Dec. 1852; 15 Law Rep. 421. See Ridley *v.* Ridley, 24 Miss. 648; Woodruff *v.* Taylor, 20 Vermont, 65.

(6.) Congress have authority to provide for calling forth the militia, to execute the laws of the Union, suppress insurrections and repel invasions; and to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States; reserving to the states, respectively, the appointment of the officers, and the authority of training the militia, according to the discipline prescribed by Congress. (*a*) The President of the United States is to be the commander of the militia, when called into actual service. The act of 28th of February, 1795, authorized the President, in case of invasion, or of imminent danger to it, to call forth such number of militia most convenient to the scene of action as he might judge necessary. The militia so called out are made subject to the rules of war; and the law imposes a fine upon every delinquent, to be adjudged by a court-martial composed of militia officers only. These militia courts-martial are to be held and conducted in the manner prescribed by the articles of war; and the act of 18th of April, 1814, prescribes the manner of holding them.

Power of Congress over the militia.

During the war of 1812, the authority of the President of the United States over the militia became a subject of doubt and difficulty, and of a collision of opinion between the general government and the governments of some of the states. It was the opinion of the government of Connecticut, that the militia could not be called out, upon the requisition of the general government, except in a case declared and founded upon the existence of one of the specified exigencies; that, when called out, they could not be taken from under the command of the officers duly appointed by the states, or placed under the immediate command of an officer of the army of the United States. Nor could the United States lawfully detach a portion of the privates from the body of the company to which they belonged, and which
* was organized with proper officers. This would, in the * 263
opinion of the government of Connecticut, impair, and

(*a*) Const. art. 1, sec. 8.

street *v.* Shannon, 1 Missou. 529. A special plea in bar of a suit on a judgment in another state, to be valid, must deny, by positive averments, every fact which would go to show that the court in another state had jurisdiction of the person, or of the subject-matter. Harrold *v.* Barretto, 1 Hall (N. Y.) 155.

eventually destroy, the state militia. When the militia are duly called into the service of the United States, they must be called as militia, furnished with proper officers by the state.

Similar difficulties arose between the government of the United States and the state of Massachusetts, on the power of the national government over the militia. Both those states refused to furnish detachments of militia for the maritime frontier, on an exposition of the constitution, which they deemed sound and just.

In Connecticut the claim of the governor, to judge whether the exigency existed, authorizing a call of the militia of that state, or any portion of it, into the service of the Union, and the claim on the part of that state to retain the command of the militia, when duly ordered out, as against any subordinate officer of the army of the United States, were submitted to, and received the strong and decided sanction, not only of the governor and council of that state, but of the legislature itself. (*a*) In Massachusetts, the governor consulted the judges of the Supreme Judicial Court as to the true construction of the constitution on these very interesting points. The judges of the Supreme Court were of opinion that it belonged to the governors of the several states to determine when any of the exigencies contemplated by the constitution of the United States existed, so as to require them to place the
* 264 militia, or any part * of it, in the service of the Union, and under the command of the President. It was observed, that the constitution of the United States did not give that right, by any express term, to the President or Congress, and that the power to determine when the exigency existed was not prohibited to the states, and that it was, therefore, as of course, reserved to the states. A different construction would place all the militia in effect at the will of Congress, and produce a military consolidation of these states. The act of 28th of February, 1795, vested in the President the power of calling forth the militia when any one of the exigencies existed, and if to that be superadded the power of determining when the *casus fœderis* occurred, the militia would, in fact, be under the President's control.

(*a*) See Official Documents of the State of Connecticut, August, 1812. The jealousy of the exercise of any power (other than that of the local governments) over the militia was very strongly manifested by the legislature and people of Connecticut, as early as 1693, when they fearlessly and successfully resisted the claim of Governor Fletcher, of New York, resting on a commission for that purpose, from the king, to the exclusive command of the militia of Connecticut. 1 Trumbull's Hist. 410–414.

As to the question how the militia were to be commanded, when duly called out, the judges were of opinion that the President alone, of all the officers acting under the United States, was authorized to command them, and that he must command them, as they were organized under officers appointed by the states. The militia could not be placed under the command of any officer not of the militia, except that officer be the President of the United States. But the judges did not determine how the militia were to be commanded, in case of the absence of the President, and of a union of militia with troops of the United States; and whether they were to act under their separate officers, and in concert as allied forces, or whether the officer present who was highest in rank, be he of the militia or of the federal troops, was to command the whole, was a difficult and perplexing question, which the judges did not undertake to decide. (*a*)

The President of the United States declared, that these constructions of the constitutional powers of the general government over the militia were novel and unfortunate, * and * 265 he was evidently and decidedly of a different opinion. He observed, in his message to Congress on the 4th November, 1812, that if the authority of the United States to call into service and to command the militia could be thus frustrated, we were not one nation, for the purpose most of all requiring it. These embarrassing questions, and the high authority by which each side of the argument was supported, remained unsettled by the proper and final decision of the tribunal that is competent to put them to rest, until the case of *Martin* v. *Mott*, (*a*) in 1827. In that case it was decided and settled by the Supreme Court of the United States, that it belonged exclusively to the President to judge when the exigency arises, in which he had authority under the constitution to call forth the militia, and that his decision was conclusive upon all other persons.

The case of *Houston* v. *Moore* (*b*) settled some important questions arising upon the national authority over the militia. The acts of Congress already referred to, and the act of 8th March, 1792, for establishing a uniform militia, were considered as covering the whole ground of congressional legislation over the subject.

(*a*) 8 Mass. 548. (*b*) 5 Wheaton, 1.
(*a*) 12 Wheaton, 19.

The manner in which the militia were to be organized, armed, disciplined, and governed was fully prescribed; provision was made for drafting, detaching, and calling forth the state quotas, when requested by the President. His orders were to be given to the chief executive magistrate, or to any militia officer he might think proper. Neglect or refusal to obey his orders was declared to be a public offence, and subjected the offender to trial and punishment, to be adjudged by a court-martial, and the mode of proceeding was perspicuously detailed.

The question before the Supreme Court of the United States was, whether it was competent for a court-martial, deriving its jurisdiction under state authority, to try and punish militia-men, drafted, detached, and called forth by the President
* 266 * into the service of the United States, and who had refused or neglected to obey the call. The court decided that the militia, when called into the service of the United States, were not to be considered as being in that service, or in the character of national militia, until they were mustered at the place of rendezvous, and that until then the state retained a right, concurrent with the government of the United States, to punish their delinquency. But after the militia had been called forth, and had entered into the service of the United States, their character changed from state to national militia, and the authority of the general government over such detachments was exclusive. Actual service was considered by Congress as the criterion of national militia, and the place of rendezvous was the *terminus a quo* the service, the pay, and subjection to the articles of war, were to commence. And if the militia, when called into the service of the United States, refuse to obey the order, they remain within the military jurisdiction of the state, and it is competent for the state to provide for trying and punishing them by a state court-martial, to the extent and in the manner prescribed by the act of Congress. The act of Pennsylvania, of 1814, provided for punishing, by a state court-martial, delinquent militia-men, who were called into the service of the United States, and neglected or refused to serve; and they were to be punished by the infliction of the penalties prescribed by the act of Congress, and such an act was held not to be repugnant to the constitution and laws of the United States. It was the lawful exercise of concurrent power, and could be concur-

rently exercised by the national and state courts-martial, as it was authorized by the laws of the state, and not prohibited by those of the United States. It would remain to be so exercised, until Congress should vest the power exclusively elsewhere, or until the states should devest their courts-martial of such a jurisdiction. This was the decision, in the first instance, of the Supreme * Court of Pennsylvania; (*a*) and it was affirmed, * 267 on appeal, by the majority of the Supreme Court of the United States.

(7.) The authority of Congress to appropriate public moneys for internal improvements has been much discussed on public occasions, and between the legislative and executive branches of the government; but the point has never been brought under judicial consideration. Powers of Congress as to internal improvements.

It has been contended, that, under the power to establish post-offices and post-roads, and to regulate commerce among the states, and to raise moneys to provide for the general welfare, and as incident thereto, Congress have the power to set apart funds for internal improvements in the states, with their assent, by means of roads and canals. Such a power has been exercised to a certain extent. It has been the constant practice to allow to the new states a certain proportion of the proceeds arising from the sale of public lands, to be laid out in the construction of roads and canals within those states, or leading thereto. In 1806, Congress authorized a road to be opened from Nashville, in Tennessee, to Natchez; and in 1809, they authorized the canal of Carondelet, leading from Lake Pontchartrain, to be extended to the river Mississippi. So late as the 8th of August, 1846, Congress granted lands to aid in the improvement of the Fox and Wisconsin rivers, and to *connect the same by a canal*, in the state of Wisconsin. The Cumberland road was constructed under the act of March 29th, 1806, and this road had been made under a covenant with the state of Ohio, by the act of April 30, 1802, that a portion of the proceeds of lands lying within that state should be applied to the opening of the roads leading to that state, with the consent of the states through which the roads might pass. But the expenditures on that road far exceeded the proceeds of sales of public lands in Ohio, and, in 1817, the President of the United States objected to a bill, on the

(*a*) Moore *v.* Houston, 3 Serg. & Rawle, 169.

ground that the constitution did not extend to making roads and canals, and improving watercourses through the different states; nor could the assent of those states confer the power. Afterwards, in 1822, the President objected to a bill appropriating money for repairing the Cumberland road, and establishing gates and tolls on it.

On these and other occasions there has been a great
* 268 * and decided difference of opinion between Congress and the President on the constitutional question. President Jefferson, in his message of December 2d, 1806, and President Madison, in his message of December 3d, 1816, equally denied any such power in Congress. On the other hand, it appears that Congress claim the power to lay out, construct, and improve post-roads, with the assent of the states through which they pass. They also claim the power to open, construct, and improve military roads on the like terms, and the right to cut canals through the several states, with their assent, for promoting and securing internal commerce, and for the more safe and economical transportation of military stores in time of war; and leaving, in all these cases, the jurisdictional right over the soil in the respective states. (*a*)

In the inaugural address of President Adams, on the 4th of March, 1825, he alluded to this question, and his opinion seemed to be in favor of the constitutional right, and of the policy and wisdom of the liberal application of the national resources to the internal improvement of the country. He intimated, that speculative scruples on this subject would probably be solved by the practical blessings resulting from the application of the power, and the extent and limitations of the general government, in relation to this important interest, settled and acknowledged to

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(*a*) In the case of Dickey *v.* Turnpike Road Co. 7 Dana, 113, the Kentucky Court of Appeals decided, that the power given to Congress by the constitution to *establish post-roads,* enabled them to *make, repair, keep open, and improve* post-roads, when they should deem the exercise of the power expedient. But in the exercise of the right of eminent domain on this subject, the United States have no right to adopt and use roads, bridges, and ferries, constructed and owned by states, corporations, or individuals, without their consent, or without making to the parties concerned just compensation. If the United States elect to use such accommodations, without the performance of such a previous condition, they stand upon the same footing, and are subject to the same tolls and regulations as private individuals. This important decision was well supported by sound reasoning.

the satisfaction of all. This declaration may be considered as withdrawing the influence of the official authority of the President from the side on which it has hitherto pressed, and adding it to the support of the preponderating opinion in favor of the competency of the power claimed by Congress. (*b*)

(*b*) In February, 1827, after an animated debate, the House of Representatives, by a vote of 101 to 67, voted to appropriate $30,000 for the continuation of surveys of routes for roads and canals. In April, 1830, on the bill, in the House of Representatives, to construct a road from Buffalo, in New York, through Washington to New Orleans, great objection was made to the constitutionality of the power, and the House, by a vote of 105 to 88, rejected the bill, though probably the vote was governed, in part, by other considerations; for other bills, for aiding the making roads and canals, passed into laws during that session, and their avowed purpose was the great object of internal improvement. President Jackson, in 1830, declared himself to be of opinion, that Congress did not possess the constitutional power to construct roads and canals, or appropriate money for improvements *of a local character;* but he admitted that the right to make appropriations for such as were of *a national character* had been so generally acted upon, and so long acquiesced in, as to justify the exercise of it, on the ground of continued usage. He objected, upon that distinction, to the bills authorizing subscriptions to the Maysville and Rockville Road Companies, as not being within the legitimate powers of Congress. The great question concerning the power of Congress to appropriate moneys for internal improvements within the states remained still as unsettled as ever, as late as the 3d of August, 1846; for on that day President Polk objected to and defeated the bill, which had passed both houses of Congress, for appropriating $1,378,450, for separate and distinct objects of internal improvement, in certain harbors, rivers, and lakes in various parts of the United States. The President denied the existence of a constitutional power in the federal government to construct works of internal improvement within the states, or to appropriate moneys from the treasury for that purpose. He considered the absence of such a power to be a principle of construction well settled, and that the inexpediency of the power was demonstrated in the exercise of it in that case; for the bill contained appropriations of money for more than twenty objects of internal improvement, called, in the bill, harbors, at places which have never been declared by law either ports of entry or delivery, and at which there has never been an arrival of foreign merchandise, and from which there has never been a vessel cleared for a foreign country. The constitutional scruples of the President went, in their application in this case, to interdict the necessary, and, in my opinion, the clearly constitutional jurisdiction and discretion of Congress, "to regulate commerce with foreign nations and among the several states," as to the improvement of the navigation of the many rivers, harbors, and great lakes within the United States, and on which waters is carried an immensely valuable commerce. This strict construction of the constitution is in striking contrast with that large construction which has been given to the constitution, in authorizing Congress to admit new states into the Union, and to which we have already alluded in a preceding note. See *ante*, p. 259. The rightful power of the general government to direct the improvement of the navigation of the internal waters of the United States for the commercial use of the Union, and to apply the revenues thereof for that purpose, appears to me to result from a sound construction of the constitution. It is one of its great and essential objects. The Mississippi, for instance, with its millions of inhabitants, and great cities and towns on its banks, calls

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loudly for means to clear and remove obstructions to a safe navigation. The states cannot do it, and the improvement must come, if it comes at all, from the general government. The whole Union is deeply interested in the safe and easy navigation of the great rivers and lakes within the limits of the United States, and bordering on two or more states. It makes no difference in reason or policy in the necessary application of the power, whether the rivers or lakes are divided by two or more states. It is sufficient for the power, if the improvement to be called for be general in its object, and for national purposes, and for the regulation, safety, and facility of commerce. All navigable waters, not land-locked within a state, whether they be rivers, harbors, gulfs, bays, lakes, or coasts of the ocean, are, and were intended to be, and ought to be, subservient to the power to regulate commerce with foreign nations, and among the several states. They fall within the congressional power, and are subject to the regulation of the United States, and they are entitled to the patronage, protection, and pecuniary support of the general government. This power is justly to be applied to the erection of light-houses, buoys, piers, breakwaters, harbors, and for clearing obstructions, and deepening and widening navigable waters. The United States have the exclusive command of the revenues derived from commerce and navigation, and the reason, justice, and policy of holding this power to exist in Congress, and that it should be liberally and largely applied, strike me with obvious and decisive force. The grant of commercial power to Congress is general, and must rest essentially in its application in the discretion of Congress, and in its judgment as to the importance of this exercise of the power to the promotion and security of commerce among the states and with foreign nations. There does not appear to be any just ground for construing the power strictly and within straight and narrow lines. A grant of general power for great national objects ought to be liberally construed to be made adequate to all future exigencies within the scope of this power. There does not appear to be any color in the constitution for prescribing arbitrary lines and limits to the power to regulate commerce.

Mr. Justice Story, in his Commentaries on the Constitution of the United States, vol. ii. pp. 429 – 440, and again, pp. 519 – 538, has stated, at large, the arguments for and against the proposition, that Congress have a constitutional authority to lay taxes and to apply the power to regulate commerce, as a means directly to encourage and protect domestic manufactures; and without giving any opinion of his own on that contested doctrine, he has left the reader to draw his own conclusions. I should think, however, from a view of the arguments as stated, that every mind which has taken no part in the discussions, and felt no prejudice or territorial or party bias on either side of the question, would deem the arguments in favor of the congressional power vastly superior. The learned commentator I should apprehend to be decidedly of that way of thinking. He says, "that the commercial system of the United States has been employed sometimes for the purpose of revenue; sometimes for the purpose of prohibition; sometimes for the purpose of retaliation and commercial reciprocity; sometimes to lay embargoes; sometimes to encourage domestic navigation, and the shipping and mercantile interest, by bounties, by discriminating duties, and by special preference and privileges; and sometimes to regulate intercourse, with a view to mere political objects, such as to repel aggressions, increase the pressure of war, or vindicate the rights of neutral sovereignty. In all these cases, the right and duty have been conceded to the national government by the unequivocal voice of the people." Mr. Hamilton, in his argument in the cabinet in February, 1791, on the national bank, considered the regulation of policies of insurance, of salvage upon goods found at sea, the regulation of pilots and of foreign bills of exchange, as coming within the power to regulate commerce. Ibid. p. 519, note.

LECTURE XIII.

OF THE PRESIDENT.

THE title of the present lecture may conveniently be examined in the following order: 1. The unity of this department. 2. The qualifications required by the constitution for the office of President. 3. The mode of his appointment. 4. His duration. 5. His support. 6. His powers.

(1). By the constitution, it is ordained that the executive power shall be vested in a President. (*a*)

Unity of the executive power.

The object of this department is the execution of the law; and good policy dictates that it should be organized in the mode best calculated to attain that end with precision and fidelity.[1] Consultation is necessary in the making of laws. The defect or grievance they are intended to remove must be distinctly perceived, and the operation of the remedy upon the interests, the morals, and the opinion of the community profoundly considered. A comprehensive knowledge of the great interests of the nation, in all their complicated relations and practical details, seems to be required in sound legislation; and it shows the necessity of a free, full, and perfect representation of the people, in the body intrusted with the legislative power. But when laws are duly made and promulgated, they only remain to be executed. No discretion is submitted to the executive officer. It is not for him to deliberate and decide upon the wisdom or expediency of the law. What has been once declared to be

(*a*) Art. 2, sec. 1.

[1] The executive branch of the Government of the United States is organized under six Departments, viz.: The State Department, the Treasury Department, the War Department, the Navy Department, the Post-Office Department, and the Department of the Interior; at the head of each of which there is a secretary, appointed by the President, by and with the advice and consent of the Senate; but subject to removal by the President alone. The Department of the Interior was created by an act of Congress, passed March 3, c. 108, 1849. This Department has a general authority of supervision and appeal over the subjects of Patents, Public Lands and Mines, Indian Affairs, Pensions, Public Buildings, the Accounts of Marshals, Clerks, and Public Officers, as well as over other minor subjects.

law, under all the cautious forms of deliberation prescribed by the constitution, ought to receive prompt obedience. The
*272 characteristical qualities required in the *executive department are promptitude, decision, and force; and these qualities are most likely to exist when the executive authority is limited to a single person, moving by the unity of a single will. Division, indecision, and delay are exceedingly unfavorable to that steady and vigorous administration of the law which is necessary to secure tranquillity at home, and command the confidence of foreign nations. Every government, ancient and modern, which has been constituted on different principles, and adopted a compound executive, has suffered the evils of it; and the public interest has been sacrificed, or it has languished under the inconveniences of an imbecile or irregular administration. In those states which have tried the project of executive councils, the weakness of them has been strongly felt and strikingly displayed; and in some instances in which they have been tried, (as in Pennsylvania and Georgia,) they were soon abandoned, and a single executive magistrate created, in accordance with the light afforded by their own experience, as well as by the institutions of their neighbors.

Unity increases not only the efficacy, but the responsibility of the executive power. Every act can be immediately traced and brought home to the proper agent. There can be no concealment of the real author, nor, generally, of the motives of public measures, when there are no associates to divide or to mask responsibility. There will be much less temptation to depart from duty, and much greater solicitude for reputation, when there are no partners to share the odium, or to communicate confidence by their example. The eyes of the people will be constantly directed to a single conspicuous object; and, for these reasons, De Lolme (*a*) considered it to be a sound axiom of policy, that the executive power was more easily confined when it was one. "If the execution of the laws," he observes, "be intrusted to a number
*273 of hands, the true cause of public evils is hidden. *Tyranny, in such cases, does not always beat down the fences that are set around it, but it leaps over them. It mocks the efforts of the people, not because it is invincible, but because it is

(*a*) Const. of England, p. 111.

unknown." The justness of these reflections might be illustrated and confirmed by a review of the proceedings of the former council of appointment in New York, under the constitution of 1777. All efficient responsibility was there lost, by reason of the constant change of the members, and the difficulty of ascertaining the individual to whom the origin of a bad appointment was to be attributed.

(2.) The constitution requires (*a*) that the President shall be a natural-born citizen, or a citizen of the United States at the time of the adoption of the constitution, and that he shall have attained to the age of thirty-five years, and shall have been fourteen years a resident within the United States. Considering the greatness of the trust, and that this department is the ultimately efficient executive power in government, these restrictions will not appear altogether useless or unimportant. As the President is required to be a native citizen of the United States, ambitious foreigners cannot intrigue for the office, and the qualifications of birth cuts off all those inducements from abroad to corruption, negotiation, and war, which have frequently and fatally harassed the elective monarchies of Germany and Poland, as well as the pontificate at Rome. The age of the President is sufficient to have formed his public and private character; and his previous domestic residence is intended to afford to his fellow-citizens the opportunity to attain a correct knowledge of his principles and capacity, and to have enabled him to acquire habits of attachment and obedience to the laws, and of devotion to the public welfare. Qualifications for President.

(3.) The mode of his appointment presented one of the most difficult and momentous questions that occupied the deliberations of the assembly which framed the constitution; and if ever the tranquillity of this nation is to be disturbed, * and its liberties endangered by a struggle for power, it *274 will be upon this very subject of the choice of a President. This is the question that is eventually to test the goodness and try the strength of the constitution; and if we shall be able, for half a century hereafter, to continue to elect the chief magistrate of the Union with discretion, moderation, and integrity, we shall undoubtedly stamp the highest value on our national character, Mode of appointment.

(*a*) Art. 2, sec. 1.

and recommend our republican institutions, if not to the imitation, yet certainly to the esteem and admiration of the more enlightened part of mankind. The experience of ancient and modern Europe has been unfavorable to the practicability of a fair and peaceable popular election of the executive head of a great nation. It has been found impossible to guard the election from the mischiefs of foreign intrigue and domestic turbulence, from violence or corruption; and mankind have generally taken refuge from the evils of popular elections in hereditary executives, as being the least evil of the two. The most recent and remarkable change of this kind occurred in France, in 1804, when the legislative body changed their elective into an hereditary monarchy, on the avowed ground that the competition of popular elections led to corruption and violence. And it is a curious fact in European history, that on the first partition of Poland, in 1773, when the partitioning powers thought it expedient to foster and confirm all the defects of its wretched government, they sagaciously demanded of the Polish diet that the crown should continue elective. (*a*) This was done for the very purpose of keeping the door open for foreign intrigue and influence. Mr. Paley (*b*) condemns all elective monarchies, and he thinks nothing is gained by a popular choice, worth the dissensions, tumults, and interruptions of regular industry, with which it is inseparably attended. I
*275 am not called upon to question the wisdom * or policy of preferring hereditary to elective monarchies among the great nations of Europe, where different orders and ranks of society are established, and large masses of property accumulated in the hands of single individuals, and where ignorance and poverty are widely diffused, and standing armies are necessary to preserve the stability of the government. The state of society and of property in this country, and our moral and political habits, have enabled us to adopt the republican principle, and to maintain it hitherto with illustrious success. It remains to be seen whether the checks which the constitution has provided against the dangerous propensities of our system will ultimately prove effectual. The election of a supreme executive magistrate for a whole nation affects so many interests, addresses itself so strongly to popular passions, and holds out such powerful temp-

(*a*) Cox's Travels in Poland, Russia, &c. vol. i.
(*b*) Principles of Moral and Political Philosophy, 345.

tations to ambition, that it necessarily becomes a strong trial to public virtue, and even hazardous to the public tranquillity. The constitution, from an enlightened view of all the difficulties that attend the subject, has not thought it safe or prudent to refer the election of a President directly and immediately to the people; but it has confided the power to a small body of electors, appointed in each state, under the direction of the legislature; and to close the opportunity as much as possible against negotiation, intrigue, and corruption, it has declared that Congress may determine the time of choosing the electors, and the day on which they shall vote, and that the day of election shall be the same in every state. (*a*) This security has been still further extended by the act of Congress (*b*) directing the electors to be appointed in each state within thirty-four days of the day of election.

The constitution (*c*) directs that the number of electors in each state shall be equal to the whole number of senators and representatives which the state is entitled to send to Congress; and, according to the apportionment of Congress * in 1832, * 276 the President was to be elected by a majority of 294 electors; and in 1844, the number of electors was reduced to 275. (*a*) And to prevent the person in office, at the time of the election, from having any improper influence on his re-election, by his ordinary agency in the government, it is provided, that no member of Congress, nor any person holding an office of trust or profit under the United States, shall be an elector; and the constitution has in no other respects defined the qualifications of the electors. (*b*) These electors meet in their respective states, at a place appointed by the legislature thereof, on the first Wednesday in December in every fourth year succeeding the last election, and vote by ballot for President and Vice-President, (for this last officer is elected in the same manner and for the same period as the President,) and

(*a*) Art. 2, sec. 1. By the act of Congress of January 23d, 1845, c. 1, an uniform time for holding elections for electors of Presidant and Vice-President in all the States was prescribed. It was to be on the Tuesday next after the first Monday in the month of November of the year in which they are to be appointed.

(*b*) Act of 1st March, 1792.

(*c*) Art. 2, sec. 1.

(*a*) This arose from the enlargement of the ratio of representation from 47,700 to 70,680 persons, for a member of the House of Representatives; by which provision the number of the House was reduced from 242 to 223 members. Act of Congress of June 25th, 1842, c. 47.

(*b*) Art. 2, sec. 1.

one of whom, at least, shall not be an inhabitant of the same state with the electors. They name in their ballots the person voted for as President, and in distinct ballots, the person voted for as Vice-President; and they make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they sign, and certify, and transmit, sealed, to the seat of the government of the United States, directed to the President of the Senate. The act of Congress of 1st of March, 1792, sec. 2, directs, that the certificate of the votes shall be delivered to the President of the Senate before the first Wednesday of January next ensuing the election. The President of the Senate, on the second Wednesday in February succeeding every meeting of the electors, in the presence of both houses of Congress, opens all the certificates, and the votes are then to be counted. The constitution does not expressly declare *by whom* the votes are to be counted and the result declared. In the case of questionable votes, and a closely contested election, this power may be all-important; and, I presume, in the absence of all legislative provision on the subject, that the
* 277 President of the Senate counts the votes, and * determines the result, and that the two houses are present only as spectators, to witness the fairness and accuracy of the transaction, and to act only if no choice be made by the electors. (*a*) The House of Representatives, in such case, are to choose *immediately*, though the constitution holds their choice to be valid, if made before the fourth day of March following. And in the cases of the elections in 1801 and 1824, as no choice was made, the House of Representatives retired and voted, and the Senate were admitted to be present as spectators. The person having the greatest number of votes of the electors for President, is President, if such number be a majority of the whole number of electors

(*a*) In determining the result of the election for President in 1841, it was declared, by joint resolution of the two houses of Congress, that one person be appointed teller on the part of the Senate, and two on the part of the House of Representatives, who were, in the presence of the two houses, to make a list of the votes as they should be declared, and the result declared to the President of the Senate, who was to be the presiding officer, and to announce to the two houses the state of the vote and the persons elected. The Vice-President, in that case, broke the seals of the envelopes of the votes, and delivered the same over to the tellers to be counted. The tellers having read, counted, and made duplicate lists of the votes, they were delivered over to the Vice-President, and read, and he then declared the result, and dissolved the joint meeting of the two houses.

appointed; but if no person have such a majority, then, from the persons having the highest number, not exceeding three, on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote. A quorum for this purpose shall consist of a member or members from two thirds of the states, and a majority of all the states shall be necessary to a choice. If the House of Representatives shall not choose a President, whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. (*b*)

The person having the greatest number of votes as Vice-President, is Vice-President, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then from the two highest numbers on the list the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two thirds of the whole number of senators, and a majority of the whole number is necessary to a choice; and no person constitutionally ineligible * to the office of President shall * 278 be eligible to that of Vice-President of the United States. (*a*)

The constitution does not specifically prescribe when or where the Senate is to choose a Vice-President, if no choice be made by the electors; and, I presume, the Senate may elect by themselves, at any time before the fourth day of March following.

The President and Vice-President are equally to be chosen for the same term of four years; (*b*) and it is provided by law, (*c*) that the term shall, in all cases, commence on the fourth day of March next succeeding the day on which the votes of the electors shall have been given.

In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the office, the same devolve on the Vice-President; and except in cases in which the President is enabled to reassume the office, the Vice-President acts as President during the remainder of the term

(*b*) Amendments to the Constitution, art. 12.
(*a*) Amendments to the Constitution, art. 12.
(*b*) Constitution, art. 2, sec. 1.
(*c*) Act of Congress, March 1, 1792.

for which the President was elected. Congress are authorized to provide by law for the case of removal, death, resignation, or inability, both of the President and Vice-President, declaring what officer should then act as President; and the officer so designated is to act until the disability be removed, or a President shall be elected, and who is in that case to be elected on the first Wednesday of the ensuing December, if time will admit of it, and if not, then on the same day in the ensuing year. (*d*) In pursuance of this constitutional provision, the act of Congress of March 1, 1792, sec. 9, declared, that in case of a vacancy in the office, both of President and Vice-President, the President of the Senate *pro tempore*, and in case there should be no President of the Senate, then the Speaker of the House of Representatives for the time being, should act as President until the vacancy was supplied. The evidence of a refusal to accept, or of a resignation of the office of President and Vice-President is declared, by the same act of Congress, sec. 11, to be a declaration in writing, filed in the office of the Secretary of State. And if the office should, by the course of events, devolve on the Speaker, after the Congress for which the last Speaker was chosen had expired, and before the next meeting of Congress, it might be a question who is to
* 279 serve, * and whether the Speaker of the House of Representatives, then extinct, could be deemed the person intended.

The mode of electing the President appears to be well calculated to secure a discreet choice, and to avoid all those evils which the partisans of monarchy have described, and the experience of other nations and past ages have too clearly shown to be the consequence of popular elections. Had the choice of President been referred at once, and directly, to the people at large, as one single community, there might have been reason to apprehend, and such no doubt was the sense of the convention, that it would have produced too violent a contest, and have been trying the experiment on too extended a scale for the public virtue, tranquillity, and happiness. Had we imitated the practice of most of the southern states, in respect to their state executives, and referred the choice of the President to Congress, this would have rendered him too dependent upon the immediate authors of his elevation to comport with the requisite energy of his own department; and it

(*d*) Constitution, art. 2, sec. 1; act of Congress, March 1, 1792.

would have laid him under temptation to indulge in improper intrigue, or to form a dangerous coalition with the legislative body, in order to secure his continuance in office. All elections by the representative body are peculiarly liable to produce combinations for sinister purposes. The constitution has avoided all these objections, by confiding the power of election to a small number of select individuals in each state, chosen only a few days before the election, and solely for that purpose. This would seem, *prima facie*, to be as wise a provision as the wisdom of man could have * devised, to avoid all opportunity for foreign or do- * 280 mestic intrigue. These electors assemble in separate and distantly detached bodies, and they are constituted in a manner best calculated to preserve them free from all inducements to disorder, bias, or corruption. There is no other mode of appointing the chief magistrate, under all the circumstances peculiar to our political condition, which appears to unite in itself so many unalloyed advantages. It must not be pronounced to be a perfect scheme of election, for it has not been sufficiently tried. The election of 1801 threatened the tranquillity of the Union; and the difficulty that occurred in that case in producing a constitutional choice, led to the amendment of the constitution on this very subject; but whether the amendment be for the better or for the worse may be well doubted, and remains yet to be settled by the lights of experience. The constitution says, that each state is to appoint electors in such a manner as the legislature may direct; and in some of the states the electors have been chosen by the legislature itself, in the mode prescribed by law. But it is to be presumed that there would be less opportunity for dangerous coalitions and combinations for party, or ambitious or selfish purposes, if the choice of electors was referred to the people at large; and this seems now to be the sense and expression of public opinion and the general practice.

(4.) The President, thus elected, holds his office for the term of four years, (*a*) a period, perhaps, reasonably long for the purpose of making him feel firm and independent in the discharge of his trust, and to give stability and some degree of maturity to his system of administration. It is certainly short enough to place him under a due sense of dependence on the pub- His term of office.

(*a*) Constitution, art. 2, sec. 1.

lic approbation. The President is re-eligible for successive terms, but in practice he has never consented to be a candidate for a third election, and this usage has indirectly established, by the force of public opinion, a salutary limitation to his capacity of continuance in office.

His salary.

(5.) The support of the President is secured * 281 by a provision * in the constitution, which declares, (*a*) that he shall, at stated times, receive for his services a compensation that shall neither be increased nor diminished during the period for which he shall have been elected; and that he shall not receive, within that time, any other emolument from the United States, or any of them. This provision is intended to preserve the due independence and energy of the executive department. It would be in vain to declare that the different departments of government should be kept separate and distinct, while the legislature possessed a discretionary control over the salaries of the executive and judicial officers. This would be to disregard the voice of experience and the operation of invariable principles of human conduct. A control over a man's living is, in most cases, a control over his actions. The constitution of Virginia considered it as a fundamental axiom of government, that the three great and primary departments should be kept separate and distinct, so that neither of them exercised the powers properly belonging to the other. But without taking any precautions to preserve this principle in practice, it made the governor dependent on the legislature for his annual existence and his annual support. The result was, as Mr. Jefferson has told us, (*b*) that during the whole session of the legislature, the direction of the executive was habitual and familiar. The constitution of Massachusetts discovered more wisdom, and it set the first example in this country, of a constitutional provision for the support of the executive magistrate, by declaring that the governor should have a salary of a fixed and permanent value, amply sufficient, and established by standing laws. Those state constitutions which have been made or amended since the establishment of the constitution of the United States have generally followed the example which it has happily set them, in this and in many other instances; and we may consider it as one of the most signal bless- * 282 ings bestowed on * this country, that we have such a wise

(*a*) Art. 2, sec 1. (*b*) Notes on Virginia, p. 127.

fabric of government as the constitution of the United States constantly before our eyes, not only for our national protection and obedience, but for our local imitation and example.

(6.) Having thus considered the manner in which the President is constituted, it only remains for us to review the powers with which he is invested. Powers of the President.

He is commander in chief of the army and navy of the United States, and of the militia of the several states, when called into the service of the Union. (*a*) The command and application of the public force to execute law, maintain peace, and resist foreign invasion, are powers so obviously of an executive nature, and require the exercise of qualities so characteristical of this department, that they have always been exclusively appropriated to it, in every well-organized government upon earth. (*b*) In no instance, perhaps, did the enlightened understanding of Hume discover less acquaintance with the practical science of government, than when he gave the direction of the army and navy, as well as all the other executive powers, to one hundred senators, in his plan of a perfect commonwealth. (*c*) That of Milton was equally chimerical and absurd, when, in his "Ready and Easy Way to establish a Free Commonwealth," he deposited the whole executive, as well as legislative power, in a single and permanent council of senators. That of Locke was equally unwise, for, in his plan of legislation for Carolina, he gave the whole authority, legislative and executive, to a small oligarchical assembly. (*d*) Such specimens * as these well justify the ob- * 283
servation of President Adams, (*a*) "that a philosopher may be perfect master of Descartes and Leibnitz, may pursue his own inquiries into metaphysics to any length he pleases, may enter

(*a*) Art. 2, sec. 2.

(*b*) Mr. Duer, in his Treatise on Insurance, vol. i. 356, intimates that, in time of war, a special embargo for a definite period might be declared by the sole authority of the President. I do not perceive any sufficient ground for that opinion in respect to the legal exercise of such a power.

(*c*) Hume's Essays, vol. i. p. 526.

(*d*) Mr. Locke's very complicated scheme of government, under the title of "Fundamental Constitutions of Carolina," is inserted at large in Locke's Works, vol. iii. pp. 665 - 678. Those legislative labors of that great and excellent man perished unheeded and unregretted by all parties, after an experience of twenty-three years had proved them to be, in the words of Mr. Grahame, the historian, "utterly worthless and impracticable."

(*a*) Defence of the American Constitutions, vol. i. Letter 54.

into the inmost recesses of the human mind, and make the noblest discoveries for the benefit of his species; nay, he may defend the principles of liberty, and the rights of mankind, with great abilities and success, and, after all, when called upon to produce a plan of legislation, he may astonish the world with a signal absurdity."

The President has also the power to grant reprieves and pardons for offences against the United States, except in cases of impeachment. The Marquis Beccaria has contended, that the power of pardon does not exist under a perfect administration of law, and that the admission of the power is a tacit acknowledgment of the infirmity of the courts of justice. And where is the administration of justice, it may be asked, that is free from infirmity? Were it possible, in every instance, to maintain a just proportion between the crime and the penalty, and were the rules of testimony and the mode of trial so perfect as to preclude every possibility of mistake or injustice, there would be some color for the admission of this plausible theory. But, even in that case, policy would sometimes require a remission of a punishment strictly due, for a crime certainly ascertained. This very notion of mercy implies the accuracy of the claims of justice. An inexorable government, says Mr. Yorke, in his "Considerations on the Law of Forfeiture," (*b*) will not only carry justice in some instances to the height of injury, but with respect to itself it will be dangerously just. The clemency of Massachusetts, in 1786, after an unprovoked and wanton rebellion, in not inflicting a single capital punishment, contributed, by the judicious manner in which its clemency was applied, to the more firm
*284 * establishment of their government. And this power of pardon will appear to be more essential, when we consider, that, under the most correct administration of the law, men will sometimes fall a prey to the vindictiveness of accusers, the inaccuracy of testimony, and the fallibility of jurors. Notwithstanding this power is clearly supported on principles of policy, if not of justice, English lawyers, of the first class and highest reputation, (*a*) have strangely concluded that it cannot exist in a republic, because nothing higher is acknowledged than the magistrate. Instead of falling into such an erroneous conclusion,

(*b*) Yorke on Forfeiture, p. 104.

(*a*) Yorke on Forfeiture, p. 107; Blackst. Com. vol. iv. p. 397.

it might fairly be insisted, that the power may exist with greater safety in free states than in any other forms of government; because abuses of the discretion unavoidably confided to the magistrate in granting pardons are much better guarded against by the sense of responsibility under which he acts. The power of pardon vested in the President is without any limitation, except in the single case of impeachments. (*b*) He is checked in that case from screening public officers, with whom he might possibly have formed a dangerous or corrupt coalition, or who might be his particular favorites and dependants.

The President has also the power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur. (*c*) Treaty power.

Writers on government have differed in opinion as to the

(*b*) There is no doubt that the power of pardon conferred on the President includes the power to pardon absolutely and conditionally. Opinions of the Attorneys-General, March 30, 1820, vol. i. 250, Feb. 25, 1836, vol. ii. 1034. The President may annex a *condition* to the pardon — as, for instance, that the guilty person should quit the United States, or join the navy — and if he does not comply with the condition, or breaks it, the pardon becomes null and void. If the culprit has not complied with the condition on which it was granted and accepted, he may be subjected to the operation of the original conviction and judgment. In England the king has the power, by the common law, to grant conditional pardons.[1] The power of the governor of New York to grant a conditional pardon, and the power of a criminal jurisdiction of the same, or of a higher degree, to arrest the party who has broken the condition wilfully, and to sentence and remand him to execution and punishment, on duly ascertaining his identity, was discussed in the case of The People *v.* Potter, in the First Circuit of New York. The New York Legal Observer for May, 1846, p. 177, reported 1 Parker Cr. R. 47. The Revised Constitution of New York, of 1846, art. 4, sec. 5, grants this conditional power of pardon to the governor.

(*c*) Art. 2, sec. 2.

[1] By statute 6 Geo. III. c. 12, the prerogative of commuting the sentence of death to transportation, in the case of capital felonies, was conferred on the crown. In the case of William Smith O'Brien, convicted of high treason in 1849, it was doubted whether the power extended to high treason; and a declaratory statute was passed, sanctioning the commutation. 12 & 13 Vict. c. 27.

The constitutional power of the President to grant a conditional pardon, offering to commute the sentence of death to that of imprisonment for life, is affirmed by the Supreme Court, McLean J., dissenting. Ex parte Wells, 18 How. U. S. 307.

Under the statutes of New York, which annex to convictions for perjury as a consequence incompetency to be a witness "until the judgment against him be reversed," 2 R. S. 681, sec. 1, it has been held, that a pardon does not restore competency. Houghtaling *v.* Kelderhouse, 1 Parker Cr. R. 241. The incompetency declared was regarded as a rule of evidence in respect to the admissibility of the witness, rather than as a part of the punishment of the crime.

nature of this power, and whether it be properly, in the natural distribution of power, of legislative or executive cognizance. As treaties are declared by the constitution to be a part of the supreme law of the land, and as, by means of them, new relations are formed, and obligations contracted, it might seem to be more consonant to the principles of republican govern-
* 285 ment, to consider the right of concluding * specific terms of peace as of legislative jurisdiction. This has generally been the case in free governments. The determinations respecting peace, as well as war, were made in the public assemblies of the nation at Athens and Rome, and in all the Gothic governments of Europe, when they first arose out of the rude institutions of the ancient Germans. On the other hand, the preliminary negotiations which may be required, the secrecy and despatch proper to take advantage of the sudden and favorable turn of public affairs, seem to render it expedient to place this power in the hands of the executive department. The constitution of the United States has been influenced by the latter, more than by the former considerations, for it has placed this power with the President, under the advice and control of the Senate, who are to be considered, for this purpose, in the light of an executive council. The President is the constitutional organ of communication with foreign powers, and the efficient agent in the conclusion of treaties; but the consent of two thirds of the senators present is essential to give validity to his negotiations. To have required the acquiescence of a more numerous body would have been productive of delay, disorder, imbecility, and, probably, in the end, a direct breach of the constitution. The history of Holland shows the danger and folly of placing too much limitation on the exercise of the treaty-making power. By the fundamental charter of the United Provinces, peace could not be made without the unanimous consent of the provinces; and yet, without multiplying instances, it is sufficient to observe, that the immensely important and fundamental treaty of Munster, in 1648, was made when Zealand was opposed to it; and the peace of 1661, when Utrecht was opposed. So feeble are mere limitations upon paper,—mere parchment barriers, when standing in opposition to the strong force of public exigency.

The Senate of the United States is a body of men most wisely selected for the deposit of this power. They are easily assem-

bled, are governed by steady, systematic * views, feel a due * 286
sense of national character, and can act with promptitude
and firmness.

The question whether a treaty, constitutionally made, was obligatory upon Congress, equally as any other national engagement would be, if fairly made by the competent authority, or whether Congress had any discretionary power to carry into effect a treaty requiring the appropriation of money, or other act to be done on their part, or to refuse it their sanction, was greatly discussed in Congress in the year 1796, and again in 1816. The House of Representatives, at the former period, declared by resolution, that when a treaty depended for the execution of any of its stipulations on an act of Congress, it was the right and duty of the House to deliberate on the expediency or inexpediency of carrying such treaty into effect. It cannot be mentioned at this day, without equal regret and astonishment, that such a resolution passed the House of Representatives on the 7th of April, 1796. But it was a naked abstract claim of right, never acted upon; and Congress shortly afterwards passed a law to carry into effect the very treaty with Great Britain, which gave rise to that resolution. President Washington, in his message to the House of Representatives of the 30th of March, 1796, explicitly denied the existence of any such power in Congress; and he insisted that every treaty duly made by the President and Senate, and promulgated, thenceforward became the law of the land.

If a treaty be the law of the land, it is as much obligatory upon Congress as upon any other branch of the government, or upon the people at large, so long as it continues in force and unrepealed. The House of Representatives are not above the law, and they have no dispensing power. They have a right to make and repeal laws, provided the Senate and President concur; but without such concurrence, a law in the shape of a treaty is as binding upon them as if it were in the shape of an Act of Congress, or of an article of the constitution, or of a contract made by authority of law. The argument in favor of the binding
and conclusive efficacy * of every treaty made by the Presi- * 287
dent and Senate is so clear and palpable, that it has probably carried very general conviction throughout the community; and this may now be considered as the decided sense of public opinion. This was the sense of the House of Representatives,

in 1816, and the Resolution of 1796 would not now be repeated. (*a*)

President's power of nomination to office.

The President is the efficient power in the appointment of the officers of government. He is to nominate, and, with the advice and consent of the Senate, to appoint ambassadors, or public ministers and consuls, the judges of the Supreme Court, and all other officers whose appointments are not otherwise provided for in the constitution; but Congress may vest the appointment of inferior officers in the President alone, in the courts of law, or in the heads of departments. (*b*) [2]

The appointment of the subordinate officers of government concerned in the administration of the laws belongs, with great propriety, to the President, who is bound to see that the laws are faithfully executed, and who is generally charged with the powers and responsibility of the executive department. The association of the Senate with the President, in the exercise of this power is an exception to the general delegation of executive authority; and if he were not expressly invested with the exclusive right of nomination in the instances before us, the organization of this department would be very unskilful, and the government degenerate into a system of cabal, favoritism, and intrigue. But the power of nomination is, for all the useful purposes of restraint, equivalent to the power of appointment. It imposes upon the President the same lively sense of responsibility, and the same indispensable necessity of meeting the public approbation or censure. This, indeed, forms the ultimate security that men in public stations will dismiss interested considerations, and
* 288 act with a steady, zealous, and * undivided regard for the

(*a*) The treaty-making power is necessarily and obviously subordinate to the fundamental laws and constitution of the state, and it cannot change the form of the government, or annihilate its constitutional powers. Story's Comm. on the Constitution, vol. iii. sec. 1502. [1]

(*b*) Art. 2, sec. 2.

[1] When the concurrence of Congress is necessary to give effect to a treaty, it is not the law of the land until that concurrence is given. The treaty-making power cannot bind or control the power of the legislature. Turner *v.* Am. Baptist Miss. Union, 5 McLean, 344. Congress may repeal a treaty so far as it is a municipal law, if it affect subjects which are within its legislative power. Taylor *v.* Morton, 2 Curtis C. C. 454.

[2] The power of the President to remove a territorial judge is discussed in United States *v.* Guthrie, 17 How. U. S. 284.

public welfare. The advice and consent of the Senate, which are requisite to render the nomination effectual, cannot be attended, in the nature of the case, with very mischievous effects. Having no agency in the nomination, nothing but simple consent or refusal, the spirit of personal intrigue and personal attachment must be pretty much extinguished, from a want of means to gratify it. On the other hand, the advice of so respectable a body of men will add still further inducements to a coolly reflected conduct in the President, and will be at all times a check on his own misinformation or error. (*a*)

The remaining duties of the President consist in giving information to Congress of the state of the Union, and in recommending to their consideration such measures as he shall judge necessary or expedient. He is to convene both houses of Congress, or either of them, on extraordinary occasions, and he may adjourn them, in case of disagreement. He is to fill up all vacancies that may happen during the recess of the Senate, by granting commissions, which shall expire at the end of their next session. (*b*) He is to receive ambassadors and other public ministers, to commission all the officers of the United States, and to take care that the laws be faithfully executed. (*c*)

(*a*) It was settled, in the case of Marbury *v.* Madison, 1 Cranch, 137, that when a person has been nominated to the Senate for office, by the President, and the President has received the advice and consent of the Senate to the appointment, and has signed the commission, the appointment is final and complete, and the person appointed is entitled to the possession of the commission, and to hold the office until constitutionally removed. The principle settled in that case was, that the official acts of the heads of the executive department, as organs of the President, which are of a political nature, and rest, under the constitution and laws, in executive discretion, are not within judicial cognizance. But when duties are imposed upon such heads, affecting the rights of individuals, and which the President cannot lawfully forbid — as, for instance, to record a patent, or furnish the copy of a record — the person, in that case, is the officer of the law, and amenable thereto in the ordinary course of justice. Ibid. 170, 171.

(*b*) In the official opinion given by Mr. Wirt, as Attorney-General of the United States, to the President, in October, 1823, he considered that, according to the reason and spirit of the constitution, the President has the rightful power to supply vacancies in office existing when the appointment is made during the recess of the Senate, though the vacancy did *happen* before the adjournment of the Senate. The instances he gives of the necessity of such a construction and power, are those in which it was nearly or quite impossible to have sent in a nomination before the adjournment of the Senate. Opinions of the Attorneys-General, vol. i. 476.

(*c*) Art. 2, sec. 2, 3. It was considered, in the message of President Jackson to Congress, of the 21st December, 1836, in relation to Texas, to be an unsettled ques-

The propriety and simplicity of these duties speak for themselves. The power of receiving foreign ministers includes in it the power to dismiss them, since he alone is the organ of communication with them, the representative of the people in all diplomatic negotiations, and accountable to the community not only for the execution of the law, but for the competent qualifications and conduct of foreign agents.

In addition to all the precautions which have been mentioned to prevent abuse of the executive trust in the mode of the President's appointment, his term of office and the precise and definite limitations imposed upon the exercise of his power, the constitution has also rendered him directly amenable by law for mal-administration. The inviolability of any officer of government is incompatible with the republican theory, as well as with the principles of retributive justice. The President, Vice-President, and all civil officers of the United States, may be impeached by the House of Representatives for treason, bribery, and other high crimes and misdemeanors, and upon conviction by the Senate, removed from office. (*a*) If, then, neither the sense of duty, the force of public opinion, nor the transitory nature of the seat, are sufficient to secure a faithful discharge of the executive trust, but the President will use the authority of his station to violate the constitution or law of the land, the House of Representatives can arrest him in his career, by resorting to the power of impeachment.

May be impeached.

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I have now finished a general survey of the office of President of the United States; and, considering the nature and extent of the powers necessarily incident to that station, it was difficult to constitute the office in such a manner as to render it equally safe and useful, by combining in the structure of its powers a due proportion of energy and responsibility. The first is necessary to

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tion to whom, under the government of the United States, strictly belonged the power of originally recognizing a new state. It was either necessarily involved in some of the great powers given to Congress, or in that given to the President and Senate, to form treaties with foreign powers, and to appoint ambassadors and other public ministers, or in that conferred upon the President to receive ministers from foreign nations. It was admitted to be most expedient, that the recognition of the independence of a newly assumed state should be left to the decision of Congress, and especially when the exercise of the power would probably lead to war.

(*a*) Art. 1, sec. 2, and art. 2, sec. 4.

maintain a firm administration of the law; the second is equally requisite, to preserve inviolate the liberties of the people. The authors of the constitution appear to have surveyed the two objects with profound discernment, and to have organized the executive department with consummate skill.

LECTURE XIV.

OF THE JUDICIARY DEPARTMENT.

As the judiciary power is intrusted with the administration of justice, it interferes more visibly and uniformly than any other part of government with all the interesting concerns of social life. Personal security and private property rest entirely upon the wisdom, the stability, and the integrity of the courts of justice. In the survey which is to be taken of the judiciary establishment of the United States, we will in the present lecture consider, (1.) The judges, in relation to their appointment, the tenure of their office, and their support and responsibility; (2.) The structure, powers, and officers of the several courts.

I. The constitution (*a*) declares that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." In this respect it is mandatory upon the legislature to establish courts of justice commensurate with the judicial power of the Union. Congress have no discretion in the case. (*b*) They were bound to vest the whole judicial power, in an original or appellate form, in the courts mentioned and contemplated in the constitution, and to provide courts inferior to the Supreme Court, in which the judicial power, unabsorbed by the Supreme Court, might be placed. The judicial power of the United States is, in point of origin and title, equal
*291 * with the other powers of the government, and is as exclusively vested in the courts created by or in pursuance of the constitution, as the legislative power is vested in Congress, or the executive power in the President. (*a*) The President is to nominate, and, by and with the advice and consent of the Senate, to appoint "judges of the Supreme Court, and all other officers whose appointments are not therein otherwise provided for, and which shall be established by law. But Congress may, by law, vest the appointment of such inferior

(*a*) Art. 3, sec. 1. (*b*) Martin *v.* Hunter, 1 Wheaton, 328–337.
(*a*) Story's Comm. vol. iii. pp. 449–456.

officers as they think proper in the President alone, in the courts of law, or in the heads of departments." (*b*) It has never been judicially settled, but it has been very authoritatively and very wisely settled by the uniform practice of the government, that the judges of the District Courts are not inferior officers, whose appointments might be withdrawn by law from the President and Senate, and placed in other hands.

The advantages of the mode of appointment of public officers by the President and Senate have been already considered. The mode is peculiarly fit and proper in respect to the judiciary department. The just and vigorous investigation and punishment of every species of fraud and violence, and the exercise of the power compelling every man to the punctual performance of his contracts, are grave duties, not of the most popular character, though the faithful discharge of them will certainly command the calm approbation of the judicious observer. The fittest men would probably have too much reservedness of manners, and severity of morals, to secure an election resting on universal suffrage. Nor can the mode of appointment by a large deliberative assembly be entitled to unqualified approbation. There are too many occasions, and too much temptation for intrigue, party prejudice, and local interest, to permit such a body of men to act, in respect to such appointments, with a sufficiently single and steady regard for the general welfare. * In ancient Rome, the prætor was annually * 292 chosen by the people, but it was in the *comitia* by centuries, and the choice was confined to persons belonging to the patrician order, until the close of the fourth century of the city, when the office was rendered accessible to the plebeians; and when they became licentious, says Montesquieu, (*a*) the office became corrupt. The popular elections did very well, as he observes, so long as the people were free, and magnanimous, and virtuous, and the public was without corruption. But all plans of government which suppose the people will always act with wisdom and integrity are plainly Utopian, and contrary to uniform experience. Government must be framed for man as he is, and not for man as he would be if he were free from vice. Without referring to those cases in our own country, where judges have been annually

Judicial independence.

(*b*) Const. art. 2, sec 2.

(*a*) Esprit des Lois, liv. viii. c. 12.

elected by a popular assembly, we may take the less invidious case of Sweden. During the diets which preceded the revolution of 1772, the states of the kingdom sometimes appointed commissioners to act as judges. The strongest party, says Catteau, (*b*) prevailed in the trials that came before them, and persons condemned by one tribunal were acquitted by another.

By the constitution of the United States, (*c*) "the judges, both of the Supreme and inferior courts, are to hold their offices during good behavior; and they are, at stated times, to receive for their services a compensation which shall not be diminished during their continuance in office." The tenure of the office, by rendering the judges independent both of the government and people, is admirably fitted to produce the free exercise of judgment in the discharge of their trust. This principle, which has been the subject of so much deserved eulogy, was derived from the English constitution. (*d*) The English judges
* 293 anciently held their seats * at the pleasure of the king, and so does the lord chancellor to this day. It is easy to perceive what a dangerous influence this must have given to the king in the administration of justice, in cases where the claims or pretensions of the crown were brought to bear upon the rights of a private individual. But, in the time of Lord Coke, (*a*) the barons of the exchequer were created during good behavior, and so ran the commissions of the common-law judges at the restoration of Charles II. (*b*) It was still, however, at the

(*b*) View of Sweden, c. 8.

(*c*) Art. 3, sec. 1.

(*d*) The high judicial officer in the ancient kingdom of Aragon, called the Justicia, and appointed by the king, having repeatedly and boldly protected private individuals from the persecutions of the crown, was, in more than one instance, removed from office at the instance of the king. To guard against the like prostration of the independent discharge of duty, it was provided, by a statute of Alfonso V., in 1442, that the justice should continue in office during life, *removable only on sufficient cause by the king and the cortes united.* Prescott's Hist. of Ferdinand and Isabella, vol i. Int. p. 108. This was the most ancient precedent in favor of the establishment of an independent judiciary, and it did great credit to the wisdom and spirit of the free states of Aragon.

(*a*) 4 Inst. 117.

(*b*) 1 Sid. 2. Charles I., in his message to Parliament, July 5th, 1641, informing them of having signed the bill for abolishing the high commission court and the star chamber, added, also, that he had granted that the judges should thereafter hold their places *quamdiu se bene gesserint.* Hume, in his History of England, vol. vi. 423, says, that this grant of the judges' patents during good behavior was made at the request of the Parliament.

pléasure of the crown to prescribe the form of the commission, until the Act of Settlement of 12 and 13 Wm. III. c. 2, which was in the nature of a fundamental charter, imposing further limitations upon the crown, and adding fresh securities to the Protestant succession, and the rights and liberties of the subject. It established that the commissions of the judges be made *quamdiu se bene gesserint*, though they were still to be removable upon the address of both houses of Parliament. (*c*) The excellence of this provision has recommended the adoption of it by other nations of Europe. It was incorporated into one of the modern reforms of the constitution of Sweden, (*d*) and it was an article in the French constitution of 1791, and in the French constitution of 1795, and it was inserted in the constitutional charter of Louis XVIII. The same stable tenure of the judges was contained in a provision in the Dutch constitution of 1814, and it is a principle which likewise prevails in most of our state constitutions, and, in some of them, under modifications more or less extensive and injurious.

In monarchical governments, the independence of the * judiciary is essential to guard the rights of the subject * 294 from the injustice of the crown; but in republics it is equally salutary, in protecting the constitution and laws from the encroachments and the tyranny of faction. Laws, however wholesome or necessary, are frequently the object of temporary aversion, and sometimes of popular resistance. It is requisite that the courts of justice should be able, at all times, to present a determined countenance against all licentious acts; and to deal impartially and truly, according to law, between suitors of every description, whether the cause, the question, or the party be popular or unpopular. To give them the courage and the firmness to do it, the judges ought to be confident of the security of their salaries and station. Nor is an independent judiciary less useful as a check upon the legislative power, which is sometimes disposed, from the force of party, or the temptations of interest, to make a sacrifice of constitutional rights; and it is a wise and

(*c*) The English judges, notwithstanding the form of their commissions, continued to consider that the demise of the crown vacated their seats. But this imperfection, if one really existed, was removed by the statute of 1 Geo. III. enacted at the recommendation of the king.

(*d*) Catteau's View of Sweden, c. 5.

necessary principle of our government, as will be shown hereafter in the course of these lectures, that legislative acts are subject to the severe scrutiny and impartial interpretation of the courts of justice, who are bound to regard the constitution as the paramount law, and the highest evidence of the will of the people. (*a*)

The provision for the permanent support of the judges is well calculated, in addition to the tenure of their office, to give them the requisite independence. It tends, also, to secure a succession of learned men on the bench, who, in consequence of a certain undiminished support, are enabled and induced to quit the lucrative pursuits of private business for the duties of that important station. The constitution of the United States, on this subject, was an improvement upon all our previously existing constitutions. By the English Act of Settlement of 12 and 13 William III., it was declared that the salaries of the judges should be ascertained and *established;* but by the statute of 1 Geo. III., the salaries of the judges were absolutely secured to them during the continuance of their commissions. The constitution of Massachusetts followed the declaration in the English statute of William, and provided that permanent and honorable salaries should be established by
* 295 law for the judges; but * this was not sufficiently precise and definite to guard against all evasion; and the more certain provision in the constitution of the United States has been wisely followed, in the subsequent constitutions of most of the individual states. In Pennsylvania, the judges of the Supreme Court, and the president judges of the courts of common pleas, by the constitution of that state, are to receive, at stated times, an adequate compensation for their services, "to be fixed by law, and not to be diminished during their continuance in office." The legislature, by act, in 1843, repealed the act of 1839, which had increased the salaries of the judges; and they also, by act of 1841, assessed upon the salaries of the judges a tax of two per cent, which the state treasurer retained. The invalidity of the statutes reducing the salaries and assessing a tax thereon, was afterwards adjudged as being unconstitutional, and a peremptory *mandamus*

(*a*) The protection of law and liberty from the encroachments of the sovereign was an avowed purpose of the institution of the *Justicia* in the Aragonese constitution, *ne quid autem damni detrimentive leges aut libertates nostræ patiantur, judex quidam medius adesto ad quem a rege provocare, si aliquem læserit, injuriasque arcere si quas forsan reipub. intulerit, jus fasque esto.* Blancas, Commentarii, p. 26, cited in 1 Prescott's Ferdinand and Isabella, Int. p. 107, n. 59.

was awarded to the state treasurer to pay the salary so retained, free of the reduction and of the taxation. *Commonwealth ex relat. Hepburn* v. *Mann*, 5 Watts & Serg. 403. The authority of the constitutional provision, and the void nature of the statutes, were illustrated and enforced in the opinion of the Supreme Court, as given by Mr. Justice Rogers. But the decision of the court has been questioned, on the ground that the *increased* salary was subject to legislative control, under the restriction, however, that the allowance was not to be lessened in respect to the judges, or any of them, below that point at which it stood when they respectively came into office. This last construction is supported by The Federalist, No. 79, and by Mr. Justice Story in his Commentaries, in the remarks on a similar constitutional provision under the United States. The constitution of New York, as amended in 1821, is an exception to this remark, and it left the judiciary department in a more dependent condition, and under greater disabilities, than it found it, and greater than in any of those states in the Union, or in any of those governments in Europe, whose constitutions had been recently reformed. (*a*)

(*a*) By the constitutions of Massachusetts, Delaware, Maryland, Virginia, Kentucky, North Carolina, South Carolina, Florida, Missouri, and Illinois, the judges of the Supreme Courts hold their offices during good behavior. This was the case in Pennsylvania under the constitution of 1790; but by the amended constitution of 1838, the tenure of the judges, as to the term, was reduced; that of the judges of the Supreme Court to fifteen years, and of the president judges to ten years, and of the associate judges to five years. This was also the case in Louisiana, until the new constitution of that state, in 1845, which reduced the term of office to eight years. In the states of Maine, New Hampshire, and Connecticut, they hold during good behavior, or until seventy years of age, and in Missouri until sixty-five, and in New York, until lately, until sixty years of age. In Tennessee the judges of the Supreme Court hold their offices for twelve years, and of the inferior courts for eight years. In Arkansas the judges of the Supreme Court hold their offices for eight years, and the judges of the Circuit Courts for four years; in the states of New Jersey, Ohio, Michigan, and Indiana, they hold for the term of seven years; in Alabama, Mississippi, and Texas, six years; and in Iowa for four years. In Vermont and Rhode Island they are annually elected. In Georgia the judges of the Supreme Court for the Correction of Errors are to be elected for a term of years, to be prescribed by law, and the judges of the Superior Court for the term of four years. The judges of the Supreme Court consist of three, and by statute are elected for six years. The new constitution of Rhode Island, which was adopted in 1842, and went into operation in May, 1843, improved the tenure of the official office, by declaring that the judges of the Supreme Court should be elected by the legislature, and hold their offices respectively until the place of the judge be declared vacant by a resolution of the legislature passed by a majority of all the members elected to each house, at the annual session for the election of public officers. By the ordinance of Congress of July, 1787, for the government of the Northwest

But though the constitution of the United States has rendered the courts of justice independent of undue influence from the

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Territory, the commissions of the judges were to continue in force during good behavior. But the subsequent constitutions of Ohio and Indiana cut down that permanent tenure to one for seven years. The constitution of Alabama, in 1819, established the judicial tenure to be during good behavior; but the constitution has been since specially altered in that particular, so as to change the tenure to the term of six years. And by the first constitution of the State of Mississippi, in 1807, the judges held their offices during good behavior, or until sixty-five years of age, and were appointed by the joint vote of the two houses of the legislature, given *viva voce*, and recorded. But by the constitution, as amended and reordained in 1833, every officer in the government, legislative, executive, and judicial, is elected by the universal suffrage of the people; that is, by every free white male citizen of twenty-one years of age, who has resided within the state for one year preceding, and for the last four months within the county, city, or town in which he offers to vote. The judges of the Supreme Court of Errors and Appeals are thus chosen by districts for six years. The chancellor is elected for six years by the electors of the whole state. The judges of the Circuit Courts are elected in districts for four years. The judges of probates and clerks of courts are elected for two years, &c. This was carrying the democratic principle beyond all precedent theretofore in this country. In all the other states of the Union (at least until very recently) the judges of the higher courts of law and equity received their appointments either from the governor and council, or governor and senate — as in Maine, Massachusetts, New Hampshire, New York, New Jersey, Maryland, Kentucky, Indiana, Louisiana, Missouri, and Michigan — or from the governor alone — as in Pennsylvania and Delaware — or from the legislature — as in Vermont, Rhode Island, Connecticut, Virginia, North and South Carolina, Georgia, Florida, Tennessee, Ohio, Illinois, Iowa, Alabama, and Arkansas. In Indiana there is a peculiar qualification in the judicial appointments; for the Supreme Court is appointed by the governor and Senate, the presidents of the Circuit Courts by the legislature, and the associate circuit judges *are elected by the people*. By the revised constitution of New York of 1846, a momentous revolution was effected in the mode of appointment, organization, and tenure of the judicial department, as well as in the appointment of officers generally. It was ordained that there should be a *Court of Appeals*, composed of eight judges, of whom four, to be elected by the electors of the state, for eight years, and four selected from the class of justices of the Supreme Court having the shortest time to serve; and the judges were to be so classified, that one should be elected every second year. There was to be a *Supreme Court*, having general jurisdiction in law and equity. The state was to be divided into *eight judicial districts*, and to have *four justices of the Supreme Court in each district*, and to be so classified, that one of the justices of each district shall go out of office at the end of every two years; and after the expiration of their terms under such classification, the term of their office shall be eight years. One or more of the judges of the Supreme Court, who is not a judge of the Court of Appeals, to be duly designated to preside at the general terms of the said courts to be held in the several districts, and any three or more of the justices (the presiding judge so designated to be one) to hold such general terms. Any one or more of them may hold special terms and *Circuit Courts*, and preside in courts of *Oyer and Terminer* in any county. The judges of the Court of Appeals and justices of the Supreme Court are to have a compensation for their services, not to be increased or diminished during their continuance in office. They are not to hold any other office or public trust, nor exercise any power of appointment to public office. The justices

other departments, it has made them amenable for any corrupt violation of their trust. The House of Representatives, as we

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of the Supreme Court and judges of the Court of Appeals may be removed by concurrent resolutions of two thirds of all the members elected to the assembly, and a majority of all the members elected to the senate. All other judicial officers and justices of the peace may be removed by the senate, on the recommendation of the governor. The judges of the Court of Appeals to be elected by the electors of the state, and the justices of the Supreme Court by the electors of the several judicial districts. *One county judge* to be elected in each of the counties of the state, except the city of New York, to hold his office for four years, and to hold the County Court, and perform the duties of surrogate. The County Court to have no original civil jurisdiction, except in special prescribed cases. But the county judge and two justices of the peace to hold *Courts of Sessions* with criminal jurisdiction; and he is to receive an annual salary, to be fixed by the board of supervisors, and to be neither increased nor diminished during his continuance in office. Justices of the peace, for services in Courts of Sessions, to be paid a *per diem* allowance out of the county treasury. The legislature may provide for the election of a surrogate in counties where the population exceeds 40,000; and they may confer equity jurisdiction, in special cases, upon the county judge, and establish inferior local courts, of civil and criminal jurisdiction, in cities. Justices of the peace are to be elected in each town at their annual town meeting, whose term of office is to be four years, and they may be removed in a due manner by the county, city, or state courts, as prescribed. The clerk of the Court of Appeals is to be *ex officio* clerk of the Supreme Court, and to be chosen by the electors of the state, and to hold his office for three years, and to be paid out of the public treasury. No judicial officer, except justices of the peace, shall receive any fees or perquisites of office.

This is the substance of the new judicial system, under the revised constitution of New York, and its very democratic character pervades the whole instrument. The central appointing power, with the extensive patronage which, under the prior constitutions of 1777 and 1821, existed in the governor and senate, is broken up and diffused through every part of the body politic. All offices of any moment now rest on popular election. Besides the judicial officers already mentioned, the secretary of state, comptroller, treasurer, attorney-general, a state engineer and surveyor, the canal commissioners, the inspectors of state prisons, the clerk of the Court of Appeals, sheriffs, clerks of counties, the register and clerk of the city of New York, district attorneys, and generally all local officers, are to be chosen by popular election.

The revised constitution of New York of 1846 is more democratic than any of the state constitutions in the Union, and it contains more specific restrictions and limitations on the exercise of legislative power than are anywhere to be met with. The convention seem to have most anxiously guarded against the influences of selfishness, intrigue, favoritism, and corruption, which have been supposed to have heretofore affected the action of the legislative department. All depends now upon the discreet exercise of the right of suffrage; and as the convention, in their circular address, truly observed, "the happiness and progress of the people of this state will, under God, be in their own hands." Perhaps the most unwise feature in the revised constitution is the election, by universal suffrage, and for comparatively short periods, of all judicial officers. The convention have disregarded, in this respect, the lessons taught by the former constitutions of 1777 and 1821, as well as the wisdom of the constitution of the United States. The organization of the judicial department is not so essential as the supply of intelligent, learned, and honest judges to administer the

have already seen, is invested with the power of impeachment, and the judges may, by that process, be held to answer before the Senate, and, if convicted, they may be removed from office.

Extent of the judicial power.

II. The federal judiciary being thus established on principles which are essential to maintain that department in a proper state of independence, and to secure the pure and vigorous administration of the law, the constitution proceeded to designate, with comprehensive precision, the objects of its jurisdiction. The judicial power extends (*b*) to all cases in law and equity arising under the constitution, the laws, and treaties of the Union; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; to controversies between a state, when plaintiff, and citizens of another state, or foreign

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laws. The danger to be apprehended, as all past history teaches us, in governments resting in all their parts on universal suffrage, is the spirit of faction, and the influence of active, ambitious, reckless, and unprincipled demagogues, combining, controlling, and abusing the popular voice for their own selfish purposes. Much more grievous would be such results when applied to the election of judges, for that would tend to break down and destroy the independence and integrity of the administration of justice.

The constitutional provision for making judges elective for short periods, by universal suffrage, is contagious, and every new constitutional reform or establishment tends that way. In the constitution of Wisconsin, established in 1846, the judges of the highest courts were to be elected for five years only.[1]

In respect to the compensation of the judges of the Superior Courts, the constitutions of the states of Maine, Rhode Island, New Jersey, Pennsylvania, Delaware, Virginia, Tennessee, South Carolina, Georgia, Florida, Alabama, Ohio, Indiana, Illinois, Michigan, Missouri, Mississippi, Arkansas, and Louisiana either establish or direct the salaries to be fixed by law, and that they shall not be diminished during the continuance of the judges in office. In New Hampshire, North Carolina, and Kentucky adequate and permanent, or fixed salaries, are directed to be provided by law. In other states (and New York is one of them) the compensation of the judges, and the duration of it, rest entirely in legislative discretion; for though the statute (as in New York) may declare that the judges shall have a specified annual salary, the statute is liable, at any future time, to legislative repeal.[2]

(*b*) Art. 3, sec. 2. Amendments to the Constitution, art. 11.

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[1] By the constitution of Illinois, ratified in 1848, the judges of the Supreme Court are elected for a term of nine years, and the subordinate judges for a shorter term. By the new constitutions of Kentucky, Louisiana, Ohio, and Iowa, the judiciary is now elective. By the constitution of California, the judges of the Supreme Court are elected for six years, and in Connecticut, by a recent change, for eight years.

[2] But the legislature cannot increase or diminish the compensation of any judge during his continuance in office. Constitution of New York, art. 6, sec. 7.

citizens or subjects; to controversies between citizens of different states, and between citizens of the same state, claiming lands under grants of different states; and between a state or citizens * thereof, and foreign states; and between citizens * 296 and foreigners. The propriety and fitness of these judicial powers seem to result, as a necessary consequence, from the union of these states in one national government, and they may be considered as requisite to its existence. The judicial power in every government must be coextensive with the power of legislation. It follows, as a consequence, that the judicial department of the United States is, in the last resort, the final expositor of the constitution as to all questions of a judicial nature. (*a*) Were there no power to interpret, pronounce, and execute the law, the government would either perish through its own imbecility, as was the case with the articles of confederation, or other powers must be assumed by the legislative body, to the destruction of liberty. That the interpretation of treaties, and the cases of foreign ministers and maritime matters, are properly confided to the federal courts, appears from the close connection those cases have with the peace of the Union, the confusion that different proceedings in the separate states would tend to produce, and the responsibility which the United States are under to foreign nations for the conduct of all its members. The other cases of enumerated jurisdiction are evidently of national concern, and they constitute one of the principal motives to union, and one of the principal cases of its necessity, which was the insurance of the domestic tranquillity. The want of a federal judiciary to embrace these important subjects was once severely felt in the German confederacy, and disorder, license, and desolation reigned in that unhappy country, until the establishment of the imperial chamber by the Emperor Maximilian, near the close of the fifteenth century; and that jurisdiction was afterwards the great source of order and tranquillity in the Germanic body. (*b*)

The judicial power, as it originally stood, extended to suits

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(*a*) The Federalist, Nos. 33, 39, 80; Story's Commentaries on the Constitution, vol. i. pp. 263, 360, 362, notes; Marshall Ch. J., in Cohens *v.* Virginia, 6 Wheaton, 264, 384. The whole question is fully examined, and all the contemporary discussions in relation to it placed in a striking view, in 1 Story's Commentaries on the Constitution, pp. 344–382.

(*b*) Robertson's Charles V. vol. i. pp. 183, 395, 397.

prosecuted *against* one of the United States by citizens of another state, or by citizens or subjects of any foreign state; but the states were not willing to submit to be arraigned as defendants
*297 before the federal courts, at the instance * of private persons, be the cause of action what it might. The decision of the Supreme Court of the United States, in the case of *Chisholm* v. *The State of Georgia*, (*a*) decided in 1793, in which it was adjudged that a state was suable by citizens of another state, gave much dissatisfaction, and the legislature of Georgia carried their opposition to an open defiance of the judicial authority. The inexpediency of the power appeared so great, that Congress, in 1794, proposed to the states an amendment to that part of the constitution, and it was subsequently amended in this particular, under the provision in the fifth article. It was declared by the amendment, (*b*) that the judicial power of the United States should not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state. (*c*) The inhibition applies only to citizens or subjects, and does not extend to suits by a state, or by foreign states or powers. (*d*) They retain the capacity to sue a state as it was originally granted by the constitution; and the Supreme Court has original jurisdiction in the case of suits by a foreign state against one of the members of the Union. (*e*)

(*a*) 2 Dallas, 419.

(*b*) Amendments, art. 11.

(*c*) As the United States have no existence, as a political ideal being, except under the organization of the constitution and laws of the United States, it is assumed as a principle flowing from the sovereignty of the United States, that the officers of the government are not subject to suits for acts in the regular discharge of their official duties. Opinions of the Attorneys-General, (Gilpin's edit.) vol. i. 457.

(*d*) The Cherokee Nation *v.* Georgia, 5 Peters U. S. 1; New Jersey *v.* New York, Ibid. 284. A *mandamus* is a *suit* within the meaning of the constitution, for it is a litigation of a right in a court of justice, seeking a decision. Weston *v.* City Council of Charleston, 2 Peters U. S. 449; Holmes *v.* Jennison, 15 Id. 564.

(*e*) Blair J., and Cushing J., in Chisholm *v.* State of Georgia, 2 Dallas, 419. That a foreign prince or state may sue in our own as well as in the English courts of law and equity, see King of Spain *v.* Oliver, 1 Peters C. C. 276; The Colombian Government *v.* Rothschild, 1 Sim. 104;[1] King of Spain *v.* Machado, 4 Russ. 238; 1 Dow, P. C.

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[1] In this case a demurrer to the bill was allowed, on the ground that a foreign state cannot bring a suit in chancery, in its own name, but must sue in the name of some public officer. But in the case of the Republic of Mexico *v.* De Arangoiz, (5 Duer N. Y.

With these general remarks on the constitutional principles of the judiciary department and the objects of its authority, we

N. S. 165, S. C. No direct suit can be maintained against the *United States*, without the authority of an act of Congress, nor can any direct judgment be awarded against them for costs. Marshall C. J., in Cohens *v.* Virginia, 6 Wheaton, 411, 412; United States *v.* Clarke, 8 Peters U. S. 444; United States *v.* Barney, Dist. C. Maryland, 3 Hall L. J. 128; United States *v.* Wells, 2 Wash. C. C. 161; Opinions of the Attorneys-General, (Gilpin's edit.) vol. ii. 967, 968. But if an action be brought by the United States to recover money in the hands of a party, he may, by way of defence, set up any legal or equitable claim he has against the United States, and need not, in such case, be turned round to an application to Congress. Act of Congress, March 3d, 1797, c. 74, sec. 3, 4. United States *v.* Wilkins, 6 Wheaton, 135, 143; Walton *v.* United States, 9 Wheaton, 651; United States *v.* Macdaniel, 7 Peters U. S. 16; United States *v.* Ringgold, 8 Peters U. S. 163; United States *v.* Clarke, 8 Ibid. 436; United States *v.* Robeson, 9 Peters U. S. 319; Same *v.* Hawkins, 10 Peters U. S. 125; Same *v.* Bank of the Metropolis, 15 Peters U. S. 377. In the case of the late Bank of the United States, which claimed damages by way of set-off on a protested bill drawn by the United States, the Attorney-General, in an elaborate official opinion, held, that the set-off could not be allowed in a suit by the United States against the bank, for dividends due the United States and withheld. Opinions of the Attorneys-General, Nov. 28th, 1834, vol. ii. 964, 982. But in the same case of The Bank of the United States *v.* The United States, in 2 How. U. S. 711, the United States sued the bank for dividends withheld; and the bank, by way of set-off, claimed 15 per cent damages, under the law of Maryland, (which on this point was the law at the city of Washington,) on a protested bill drawn by the government of the United States on France, and taken by the bank as first indorsee, and presented at Paris for payment, and protested for non-payment, and taken up by a banking-house in Paris, *supra protest*, for the honor of the Bank of the United States, which was the first indorser. It was held, by a majority of the court, that the bank, on satisfying the banking-house in Paris, became the lawful holder of the bill, and as such holder entitled to the damages by way of set-off against the United States as drawer, in like manner as any individual holder of a protested bill would be. Mr. Ch. J. Taney, who, when attorney-general, gave a brief opinion in this case, added a new opinion founded on the special circumstances of the case, against the allowance of the set-off, denying that the United States were bound, either in law or equity to pay, or the bank entitled to claim, the contested damages. Independent of anything special in the case, the general doctrine of the decision was sound and unquestionable. To entitle the party to his set-off, his claim must have been previously submitted to the accounting officers of the treasury and been disallowed, or he must reasonably account for the omission. See sec. 3 and 4 of the act aforesaid. In the case Ex parte Madrazzo, 7 Peters U. S. 627, a subject of the King of Spain filed a libel in the *admiralty*, against the *State of Georgia*, alleging that the state was in possession of moneys, being the proceeds of certain property belonging to him, and claiming a right to institute a suit in the admiralty for the same, and that the 11th amendment to the constitution of the United States did not take away the jurisdiction of the courts of the United States in suits in *admiralty* against a state. But on appeal from the decree of

639,) it was held that the House of Lords had, in the case of The King of Spain *v.* Huttill, (1 Dow & Clark, 164,) repudiated and overruled the doctrine laid down in the case of The Colombian Government *v.* Rothschild, and that the Republic of Mexico might sue *eo nomine*.

proceed to a particular examination of the several courts of the United States, as ordained by law.

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the Circuit Court, sustaining the libel, to the Supreme Court of the United States, it was held, that the proceeding in question was a mere *personal* suit against a state, to recover property in its possession; and that a private person could not commence such a suit; and that it was not a case *where the property was in the custody of a court of admiralty, or brought within its jurisdiction, and in possession of any private person.* The jurisdiction would seem to have been impliedly admitted in the latter case. A state cannot be sued in its own courts without its consent. Michigan State Bank *v.* Hastings, Walker Ch. (Mich.) 9. This is an attribute of sovereignty and of universal law.[2] But a foreign sovereign may voluntarily become a party to a suit in the tribunals of another country, and have his rights asserted and enforced.[3] And it was declared in the case of The Exchange, 7 Cranch, 116, that all persons and property within the territorial jurisdiction of any sovereign were amenable to the local jurisdiction, with such exceptions only as common usage and public policy had allowed. The result is, (1.) That no citizen of any of the United States, or subject of a foreign state, can sue a state. (2.) That a foreign state may sue one of the United States before the Supreme Court of the United States, and there only. (3.) That the United States cannot be sued.[4]

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[2] The Constitution of Arkansas expressly provides that suits may be instituted against the state; these provisions are to be liberally construed. State *v.* Curran, 7 Engl. 321.

[3] In the Pennsylvania Law Journal, Dec. 1847, p. 97, a case is reported which occurred in the *Civil Tribunal of the Seine.* A Frenchman attached merchandise of the Pacha of Egypt on a claim made under a contract entered into with an agent of the Pacha; the court declared that it had no jurisdiction over foreign governments, except in the case of immovable property, and the claim was on a contract made with the Egyptian government. See, also, Munden *v.* Duke of Brunswick, 10 Ad. & Ell. N. S. 656. No English court has jurisdiction to entertain an action against a foreign sovereign for anything done, or omitted to be done by him, in his public capacity as representative of the nation of which he is the head. De Haber *v.* Queen of Portugal, 7 E. L. & Eq. 340.

[4] Congress, by act of February 24th, 1855, (Stat. at Large, vol. x. p. 612,) established a court of claims, which was authorized to "hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, which may be suggested to it by a petition filed therein; and also all claims which may be referred to it by either house of Congress." But the judgments of the court were of no effect until confirmed by Congress. And even if the court decided against any claim, Congress might overrule their decision. By the act of March 3d, 1863, (12 Stat. at Large, 765,) the court was remodelled and its powers enlarged. It now consists of five judges. All bills and petitions for the satisfaction of private claims founded on a law of Congress, a regulation of any department, or on contract express or implied with the government presented in either house of Congress, are to be put to the court unless otherwise specially ordered. It has jurisdiction of all set-offs and counter demands of the United States against the claimant, and may give judgment for the United States for the balance due, if any. Appeals may in certain cases be taken to the Supreme Court of the United States. Final judgments in favor of a claimant are to be paid out of the treasury, after an appropriation shall be estimated for by the secretary. A decision against the claimant is a final bar to any further demand.

*(1.) The Supreme Court was instituted by the constitution, which ordained that "the judicial power of the United States should be vested in one Supreme Court, and in such inferior courts as Congress might from time to time ordain and establish." (a) But it received its present organization from Congress, for the constitution had only declared, in general terms, that there should be a Supreme Court, with certain original and appellate powers. It consists of a chief justice and eight associate justices, any five of whom make a quorum; and it holds one term annually, at the seat of government, commencing on the first Monday in December, and continued at discretion. (b) But though five of the judges are requisite for business in general, yet any one or more of them may make all necessary orders in a suit, preparatory to the hearing or trial, and continue the court from day to day, in the absence of a quorum; and the judge of the fourth circuit attends at the city of Washington, on the first Monday of August, annually, for interlocutory matters. *298 Supreme Court.

The Supreme Court has exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state as *defendant* and its citizens; and except, also, between a state as *defendant*, and citizens of other states or aliens, in which cases it has no jurisdiction; but in all these cases where a state is *plaintiff*, it has original but not exclusive jurisdiction. It has,

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(4.) That the United States may sue a state,[5] and perhaps they may, as a *bona fide assignee* of an individual creditor of a state, and perhaps an individual state, or a foreign state, as such assignee, may do it. See Hamilton's Report on Public Credit, 1790, p. 9. This last point is without any judicial support that I am aware of; and it may be questioned how far voluntary assignments, made and accepted for the sake of the remedy, would be available.

(a) Art. 3, sec. 1.

(b) Acts of Congress of April 29th, 1802; February 24th, 1807, sec. 5; May 4th, 1826; January 21st, 1829; March 3d, 1837, c. 34; and of 17th June, 1844, c. 96.

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[5] The United States may bring a civil suit for a trespass on the public lands, either in the state courts or in their own tribunals, by the common law. Cotton *v.* United States, 11 How. U. S. 229; State of Pennsylvania *v.* Wheeling Bridge Co. 13 How. U. S. 519.

By act of Congress, February 26, 1853, (Stat. at Large, vol. x. p. 170,) all transfers of claims upon the United States are declared void, unless executed in presence of two witnesses, after the allowance of the claim, the ascertainment of amount due, and the issuing of a warrant for its payment. Penal provisions are enacted against officers of the government, senators, or members of Congress, prosecuting such claims.

also, exclusively, all such jurisdiction of suits, or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise, consistently with the law of nations; and original but not exclusive jurisdiction of all suits brought by ambassadors or other public ministers, or in which a consul or vice-consul shall be a party. (*c*) The Supreme Court was also clothed by the constitution (*d*)

"with appellate jurisdiction, both as to law and fact,
*299 *with such exceptions and under such regulations as Congress should make"; and, by the Judiciary Act of 1789, appeals lie to this court from the circuit courts, and the courts of the several states. Final judgments and decrees, in civil actions and suits in equity, in the circuit courts of the United States, whether brought there by original process, or removed there from the state courts, or by *appeal* from the district courts, in cases where the matter in dispute exceeds two thousand dollars, exclusive of costs, may be re-examined, by writ of error, and reversed or affirmed, in the Supreme Court. (*a*)[1] Final judgments

(*c*) Act of Congress, September 24th, 1789, sec. 13.

(*d*) Art. 3, sec. 2.

(*a*) Act of Congress of September 24th, 1789, sec. 22. In the cases of Gordon *v.* Ogden, and Smith *v.* Honey, 3 Peters U. S. 33, 469, it was decided, that whatever may have been the amount claimed by the plaintiff in the court below, if the judgment in his favor be less than $2,000, and the writ of error has been sued out by the *defendant* below, the court has not jurisdiction; but if the writ of error be brought by the *plaintiff* below, and the amount claimed in his declaration exceeded $2,000, the court has jurisdiction, because, if the judgment be reversed, he may recover what he claims. Knapp *v.* Banks, 2 How. U. S. 73; Bennett *v.* Butterworth, 8 How. U. S. 124.

[1] An act of Congress of May 31, 1844, gives appellate jurisdiction to the Supreme Court, in revenue cases, without regard to the sum in dispute, provided the judgment appealed from was *rendered in a circuit court of the United States*. The United States *v.* Carr, 8 How. U. S. 1. If, by *definite computation*, it can be shown that a recovery cannot exceed two thousand dollars, no appeal can be had. Sewall *v.* Chamberlain, 5 How. U. S. 6. The Supreme Court has no appellate jurisdiction when the Circuit Court refuses to grant a writ of *habeas corpus*, prayed for by a father to take his child out of the custody of the mother. The value of the subject-matter in dispute is, in its nature, incapable of being estimated in money, and the rule of jurisdiction, therefore, cannot be applied. Barry *v.* Mercein, 5 How. U. S. 103. Though the parties admit that the value of the thing in controversy is greater than two thousand dollars, yet if it appear upon the face of the record to be less than that amount, the court will dismiss the appeal. Gruner *v.* United States, 11 How. U. S. 163. The court will not compute interest to make up the sum. Udall *v.* Ohio, 17 How. U. S. 17. Olney *v.* Falcon, Id. 19.

In the matter of Metzger, 5 How. U. S. 176, it was held, that where a district judge,

and decrees in the circuit courts, in cases of admiralty and maritime jurisdiction, and of prize or no prize, where the matter in dispute exceeds two thousand dollars, exclusive of costs, may be reviewed on appeal in the Supreme Court; (*b*) and in admiralty and prize cases, new evidence is admitted to be receivable on appeal in the Supreme Court. (*c*) This admission is conformable to the doctrine and usage of appellate courts of admiralty, permitting the parties, upon the appeal, to introduce new allegations and new proofs, and to add new counts to the libel. (*d*) So, also, a final judgment or decree, in any suit in the highest court of law or equity of a state, may be brought up on error in point of law, to the Supreme Court of the United States, provided the validity of a treaty, or statute of, or authority exercised under the United States, was drawn in question in the state court, and the decision was against that validity; or provided the validity of any state authority was drawn in question, on the ground of its being repugnant to the constitution, treaties, or laws of the United

(*b*) Though seamen may sue jointly for wages in the admiralty, under shipping articles for the same voyage, their contracts are treated as distinct; and though several claims of this description, contained in one suit, amount in the aggregate to more than $ 2,000, that is not sufficient to give jurisdiction on appeal to the Supreme Court. Oliver *v.* Alexander, 6 Peters U. S. 143. Conkling's Treatise, (2d edit.) 32.

Where separate libels filed by owners of a cargo were consolidated by order of the court, and the decree adjudged to some of the libellants more and to some less than two thousand dollars, the appeal to the Supreme Court was dismissed as to all the latter cases. Rich *v.* Lambert, 12 How. U. S. 347.

(*c*) Act of Congress, March 3d, 1803, c. 40. It was decided, in United States *v.* Goodwin, 7 Cranch, 108, that in civil cases at law, the judgment of the Circuit Court is final, where the cause is removed by *writ of error* from the *District Court*, and no writ of error lies therefrom in such cases to the Supreme Court of the United States. See 2 Wheaton, 395; 12 Peters U. S. 143, S. P. But by the act of Congress of July 4th, 1840, c. 43, sec. 3, this distinction was abolished, and writs of error now lie to the Supreme Court from all judgments of a circuit court in cases brought there by *writs of error* from the District Court, in like manner as if the suit had been originally brought in the Circuit Court.

(*d*) The Marianna Flora, 11 Wheaton, 38; Foster *v.* Gardiner, C. C. Mass. Amer. Jur. vol. ii. p. 21.

sitting at chambers, had decided that there was sufficient cause for the surrender of a person claimed by the French government, and had committed him to custody to await the order of the President of the United States, the Supreme Court had no jurisdiction to issue a *habeas corpus* for the purpose of reviewing that decision. But see, In the matter of Metzger, 1 Barb. (N. Y.) 248, where the authority of the United States district judge was denied, and the prisoner discharged by a state judge. See In re Kaine, 14 How. U. S. 103.

States, and the decision was in favor of its validity; or provided the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, was drawn in question, and the decision was against the title, *300 right, privilege, or *exemption, specially claimed under the authority of the Union. (*a*)[1] Upon error from a decision in a state court, no other error can be assigned or regarded, than such as appears upon the face of the record, and immediately respects the questions of validity, or construction of the constitution, treaties, statutes, commissions, or authorities in dispute.[2]

The Supreme Court is also armed with that superintending authority over the inferior courts, which ought to be deposited in the highest tribunal and dernier resort of the people of the United States. It has power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and to issue writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office under the authority of the United States. (*b*) This court, and each of its judges, have power to grant writs of *ne exeat* and of injunction; but the former writ cannot be granted unless a suit in equity be commenced, and satisfactory proof be made that the party designs quickly to leave the United States; and no injunction can be granted to stay proceedings in a state court, nor in any case, without reasonable notice to the adverse party. (*c*) All the courts of the United States have power to issue writs of

(*a*) Act of Congress of September 24th, 1789, sec. 25.
(*b*) Act of September 24th, 1789, sec. 13.
(*c*) Act of Congress, March 2d, 1793, c. 57, sec. 5.

[1] This does not apply to laws of the territories of the United States. Miners' Bank *v.* State of Iowa, 12 How. U. S. 1. As to the manner in which the question must be raised in the state courts, to give the right of appeal to the Supreme Court, see Williams, Trustee, *v.* Oliver, 12 How. U. S. 124. No appeal lies from the decisions of territorial judges acting as commissioners. United States *v.* Ferreira, 13 How. U. S. 40. The claim of a marshal to goods upon which he had levied an execution under a judgment of the Circuit Court, is a right asserted under the authority of the United States. Clements *v.* Berry, 11 How. U. S. 398. The Supreme Court of the United States has no jurisdiction, under sec. 25 of the Judiciary Act, of a controversy between parties claiming title under patents granted by the State of Louisiana to lands belonging to that state under grants made by Congress. Shaffer *v.* Scudday, 19 How. U. S. 16.

[2] And the jurisdiction given in *certified cases* extends to questions of law only, and not to questions *of fact*. Wilson *v.* Barnum, 8 How. U. S. 258.

scire facias, *habeas corpus*, and all other writs not specially provided by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. (*d*)[3] *So the judges of the Supreme *301

(*d*) Act of September 24th, 1789, sec. 14; United States *v.* Hamilton, 3 Dallas, 17; Ex parte Bollman, 4 Cranch, 75; Ex parte Kearney, 7 Wheaton, 38; Ex parte Watkins, 7 Peters U. S. 568. *The principles and usages of law* here mean those general principles and usages which are to be found, not in the legislative acts of any particular state, but in that generally recognized and long-established law, which forms the substratum of the laws of every state. Marshall, Ch. J., in United States *v.* Burr. The Judiciary Act of 1789, sec. 17, gave to the courts of the United States power to punish, by fine or imprisonment, at the discretion of the courts, all *contempts* of authority, in any cause or hearing, before the same. But the act of Congress of March 2, 1831, c. 99, limited and defined this power, by declaring that the power to issue attachments, and inflict summary punishments, for contempt of court, shall not be construed to extend to any cases except the misbehavior of any person in the presence of the court, or so near thereto as to obstruct the administration of justice; and the misbehavior of any of the officers of the said courts in their official transactions; and the disobedience or resistance, by any officer of the said courts, party, juror, witness, or any other person, to any lawful writ, process, order, rule, decree, or command of the said courts. The provisions of this act of Congress have been adopted in Tennessee by statute, in 1831, and in Ohio by statute, in 1834, with even some impediments thrown in the way of the prompt execution of the power; for the statute in the latter state declares that the charge is to be stated in writing, and the accused shall be heard in his defence by himself or counsel. The power of the English courts is more extensive. Thus, where several persons were to be tried successively for the same treasonable act, the Court of Oyer and Terminer prohibited publication of any of the proceedings, until the whole of the trials had been brought to a conclusion; and it was held that a publication, disregarding this order, was a contempt punishable by fine and imprisonment, and that a party disregarding a summons to appear and answer for the contempt, might be fined in his absence. The King *v.* Clement, 4 B. & Ald. 218, 11 Price, 68, S. C. The fair and impartial administration of justice in such cases would seem to require the existence and exercise of such a power. The act of Congress, however, reaches and prohibits all interference by attachment and summary punishment for contempts committed out of the presence of the court, by libels upon the court and the parties, and pending causes; and it is a very considerable, if not injudicious abridgment of the immemorially exercised discretion of the courts in respect to contempts. But in the "System of Penal Law, prepared for the State of Louisiana," in 1824, by Edward Livingston, Esq., the courts were stripped of almost all power to preserve themselves from insult. The code provided for contempts *in the presence of the court*, by word, clamor, noise, or disobedience to legal orders, or violence, or threats. It provided, also, for contempts, by using verbally, in court, or in any pleading or writing, *addressed to the judges*, in any *cause pending*, any indecorous, contemptuous, or insulting expression, to or of the judges, with intent to insult. But how did it provide? Contempts were to be tried on indictment, (which may be at another session,) and the jury are to pass upon the intent,

[3] Under this power a mandamus was sustained, issued by a Circuit Court of the United States, to compel the levying of a tax by county commissioners whose duty it was by law to levy such a tax to pay a judgment recovered against them. Commissioners of Knox Co. *v.* Aspinwall, 24 How. U. S. 376.

Court, as well as the judges of the district courts, may, by *habeas corpus*, relieve the citizens from all manner of unjust imprisonment occurring under or by color of the authority of the United States, or for acts done, or omitted to be done, in pursuance of a law of the United States, or of a judicial authority of any court or

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and whether the words were indecorous, contemptuous, or insulting. There is no provision at all for insulting gestures or looks. Code, tit. 5, c. 11. The New York Revised Statutes, vol. ii. (4th ed.) p. 467, have dealt with the subject of contempts more temperately and judiciously, and with a wiser regard for the honor and dignity of the courts, so essential to the orderly, pure, independent, and impartial administration of justice. They provide that every court of record may punish summarily, *disorderly, contemptuous or insolent behavior*, committed in the immediate presence of the court, and tending to interrupt its proceedings and impair the respect due to its authority; and for breaches of the peace, noises, and disturbances, tending directly to interrupt its proceedings; and for wilful disobedience or resistance to lawful orders; and *for the publication of false or grossly inaccurate reports of its proceedings.* The *commissioners appointed to revise the civil code of Pennsylvania*, by their *report*, in January, 1835, followed the substance of the Pennsylvania act of 1809, on the subject of contempts, and confined the power of imprisonment to contempts committed in open court. No publication out of court, respecting the conduct of the court, or any of its officers, jurors, witnesses, or parties in any cause pending in court, exposes the party to summary punishment, and the only remedy for the persons aggrieved is by indictment or action at law. The act of Pennsylvania of 16th June, 1836, enacted the same provision. In the case Ex parte Poulson, which arose upon a motion in the Circuit Court of the United States for the Eastern District of Pennsylvania, in 1835, in the cause of Drew *v.* Swift, for a rule on Poulson, the editor of a daily paper, to show cause why an attachment should not issue against him for a contempt, in publishing a very libellous article upon the plaintiff pending the trial, Judge Baldwin felt himself bound to deny the motion, in consequence of the act of Congress of 1831. That act had withdrawn from the courts of the United States the common-law power to protect their suitors, officers, witnesses, and themselves, against the libels of the press, however atrocious, and though published and circulated pending the very trial of a cause. The case before him was one which showed, in a very strong light, the unreasonableness of the law, in leaving the suitor unprotected at the moment when he stands most in need of it, and when the mischief to him might be great and remediless. The want of such protection, and the undue distrust which the denial of the common-law power over contempts implies, tend to impair, in the estimation of the public, the value of the administration of justice.

The power of the courts to punish summarily for contempts has been lately much restrained in England; for in the case of The King *v.* Faulkner, (2 Mont. & Ayr. Cas. in Bank. 311,) it was held, in the Court of Exchequer, that a single commissioner of the Court of Bankruptcy, sitting alone, had no power to punish any contempt, however gross or personal.[4]

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[4] The sheriff was held to be in contempt for insisting on addressing the grand jury in open court against the order of the judge and also for posting on the walls of the court a placard disapproving and protesting against an order of the court directing a part of the court-room to be cleared of the persons present. *In re* Sheriff of Surrey, 2 Fost. & Finl. 234.

judge thereof. The justices of the Supreme Court, and the judges of district courts, may grant writs of *habeas corpus*, when subjects of any foreign government, and domiciled therein, are in custody, under the authority or process of the United States, or of any state, for acts done under the order or sanction of any foreign state, the validity of which depends upon the law of nations, or under color thereof; and may hear the case, and discharge the prisoner, if entitled thereto by reason of such alleged authority set up, and the law of nations applicable thereto; and all proceedings had in the mean time, under any state authority, are declared void. (*a*)[1]

(2.) The limits and jurisdiction of the circuit courts of the United States have been subject to frequent changes, and Circuit Court. their number has been steadily increasing with the increase of states and districts, ever since the first organization of the national courts under the act of Congress of the 24th of September, 1789. They are established in each district (with a few exceptions) of the nine great circuits into which the United States are now (*b*) divided. The first circuit is composed of the districts of Maine, New Hampshire, Massachusetts, and Rhode Island; the second circuit, of the districts of Connecticut, Vermont, and the northern and southern districts of New York; the third circuit, of the district of New Jersey, and the eastern and western districts of Pennsylvania; the fourth circuit, of the districts of Maryland,

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(*a*) Acts of Congress of September 24th, 1789, sec. 14, and March 2d, 1833, c. 57, sec. 7, and August, 29th, 1842, c. 257. This last statute was passed in consequence of the case of McLeod, who was indicted for murder, in crossing the river Niagara, in the night, with an armed force, and seizing and destroying the steamboat Caroline, attached to the American shore, and in which affray an American citizen was killed. He pleaded authority from the Canadian powers, which authority was admitted, or assumed, by the British government; but the plea was overruled by the judicial authorities of New York, and McLeod brought to trial. See 1 Hill, 377, and 25 Wendell, 483.[2]

(*b*) 1840.

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[1] As to the authority of the Supreme Court of the United States to issue a *habeas corpus* as an appellate tribunal, see *ante*, p. 299, note. State courts have jurisdiction, concurrent with the federal courts, of a writ of *habeas corpus* for the body of a minor enlisted in the army. Commonwealth *v.* Fox, 7 Barr, 336. This power is denied in the matter of Vertemaitre, Dist. Ct. for S. Dist. of N. Y., Law Rep. Apr. 1851, p. 608, New York Leg. Obsr. May, 1851, p. 129.

[2] In Buron *v.* Denman, 2 Exch. 167, it was held, that the ratification of an individual's act by the government rendered it an act of state, for which the *crown alone* was responsible.

Delaware, and Virginia; the fifth circuit, of the districts of Alabama and Louisiana; the sixth circuit, of the districts of North Carolina, South Carolina, and Georgia; the seventh circuit, of the districts of Ohio, Indiana, Illinois, and Michigan; the eight circuit, of the districts of Kentucky, east, middle, and west Tennessee, and the district of Missouri; and the ninth circuit, of the districts of Mississippi and Arkansas. In each district of these circuits, with the exception of some of the districts in Alabama, Louisiana, Mississippi, and Arkansas, two circuit courts are annually held by one of the judges of the Supreme Court and the district judge of the district; but the Supreme Court may, in cases where special circumstances shall in their judgment render the same necessary, assign two of the judges of the Supreme Court to attend a circuit court; and when the district judge shall be absent, or shall have been counsel, or be interested in the cause, the Circuit Court may consist only of a Judge of the Supreme Court. (*c*) [3]

* 302 * These circuit courts, thus organized, are vested with original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law, or in equity, where the matter in dispute exceeds five hundred dollars, exclusive of costs, and the United States are plaintiffs, or an alien is a party, and the suit is between a citizen of the state where the suit is brought, and a citizen of another state. (*a*) They have likewise exclusive cognizance, except in certain cases which will be

(*c*) Acts of Congress of April 29th, 1802, c. 31; of March 3d, 1837, c. 34; of February 22d, 1838, c. 12; and of August 16th, 1842, c. 180.

(*a*) The damages laid in the declaration, if they exceed $ 500, give the jurisdiction as to the matter in dispute. Muns *v.* Dupont, 2 Wash. C. C. 463. It is the amount of damages claimed in the declaration that determines the jurisdiction in the federal courts. Gordon *v.* Longest, 16 Peters U. S. 97. The limitation to $ 500 and upwards was abolished by the act of March 3d, 1815, in cases where the United States are plaintiffs. The suits between citizens, in civil causes, where the demand is to any small amount, belong to the local state courts, and are generally cognizable before single magistrates, and with juries reduced in number, or without juries, as the case may be. A late English statute (8 and 9 Vict. c. 127) instituted a court of that kind, of an efficient organization and summary jurisdiction. It consists of a single judge, who is to be a barrister, a pleader, or an attorney of ten years' standing; and it has jurisdiction to try summarily all suits for debts under £ 20. The judge has power to

[3] If both the judges be disqualified by interest or otherwise, the cause will be certified to the nearest court in the circuit competent in point of law to try it. Richardson *v.* Boston, 1 Curtis C. C. 250.

hereafter mentioned, of all crimes and offences cognizable under the authority of the United States, exceeding the degree of ordinary misdemeanors, and of them they have concurrent jurisdiction with the district courts. (*b*) But no person can be arrested in one district for trial in another, and no civil suit can be brought against an inhabitant of the United States out of his district; (*c*) [2] and the act of Congress provides against the assumption of federal jurisdiction to be created by the assignment of promissory notes, or other choses in action, except foreign bills of exchange. [3] This restriction applies to assignees by operation of law, (*d*) but it does

commit, in all cases of fraud or misconduct, to prison for forty days, and is the judge of all matters of law and fact, and there is to be no appeal from his decisions; but *certiorari* will lie to remove all suits above £10.

(*b*) See *infra*, pp. 360 – 363.

(*c*) Process of foreign attachment cannot be issued by the circuit courts of the United States, where the defendant is domiciled abroad, or not found within the district. The circuit courts cannot issue process beyond the limits of their district, except subpœna, for witnesses and executions in two special cases. Toland *v.* Sprague, 12 Peters U. S. 300.[1]

(*d*) Sere *v.* Pitot, 6 Cranch, 332.

[1] Saddler *v.* Hudson, 2 Curtis C. C. 6. In Allen *v.* Blunt, 1 Blatchf. C. C. 480, in an action upon a judgment rendered in the Circuit Court in Massachusetts, the plaintiff failed to recover, because it did not affirmatively appear on the face of the record from that court, that the defendant was personally served with process within that district. And see Sadlier *v.* Fallon, 2 Curtis C. C. 579.

[2] "But a civil suit may be brought against an inhabitant of the United States, in any district in which he shall be found at the time of serving the writ." Act of Congress of September 24th, 1789, (1 Statutes at Large, 78.) The circuit courts have jurisdiction of torts, wherever committed, in cases where they have jurisdiction of the persons of the parties. Mitchell *v.* Harmony, 13 How. U. S. 115. The state courts have jurisdiction in actions of trover, against a postmaster, for non-delivery of a letter. Teal *v.* Felton, 12 How. U. S. 284.

[3] A debt secured by a bond and mortgage is a "chose in action" within the meaning of the statute. Sheldon *v.* Sill, 8 How. U. S. 441. In this case, the question was raised whether the act of Congress, denying the courts of the United States jurisdiction in cases where suits are brought on choses in action, *under the circumstances mentioned in the text*, was within the constitutional powers of Congress; and the court held that it was. See, also, Smith *v.* Kernochen, 7 How. U. S. 198. Although the assignor make the assignment for the express purpose of giving the United States courts jurisdiction, they will not have jurisdiction, unless the assignee was also privy to, or entertained such purpose. The rights of the remote assignee of a *chose in action* shall not be prejudiced by the disability of intermediate holders, if the party first entitled to the debt could have sued under the act, and the assignee now occupy the same position. Milledollar *v.* Bell, 2 Wallace Jr. C. C. 334. The assignee is not restrained from bringing suit to recover the thing in specie, or damages for its detention. Deshler *v.* Dodge, 16 How. U. S. 622.

not apply to notes payable to bearer; (*e*) nor to suits by Indorsee *v.* Indorser, for that creates a new contract; (*f*)[4] nor to suits in equity by a judgment creditor; (*g*) nor to cases in which the United States are a party. (*h*) The circuit courts have also appellate jurisdiction from all final decrees and judgments in the district courts, where the matter in dispute, exclusive of costs, exceeds fifty dollars. If the remedy be on final decrees in the district courts, in cases of admiralty and maritime jurisdiction, and the matter in dispute exceeds three hundred dollars, it is by appeal; and if on final judgments in civil actions, and the matter in dispute exceeds fifty dollars, it is by writ of error. (*i*) And if
* 303 any suit be commenced * in a state court against an alien, or by a citizen of the state in which the suit is brought against a citizen of another state,[1] or against a citizen of the same state claiming lands under a grant from another state, and the matter in dispute exceeds five hundred dollars, exclusive of costs, the defendant, on giving security, may remove the cause to the next circuit court. (*a*) The circuit courts have also original cognizance in equity and at law of all suits arising under the revenue laws of the United States, or under any law of the United States relative to copyrights and patent-rights growing out of inventions and discoveries, and to protect such rights by injunction. (*b*)[2] The juris-

(*e*) Bullard *v.* Bell, 1 Mason, 251; Bank of Kentucky *v.* Wister, 2 Peters U. S. 318.

(*f*) Young *v.* Bryan, 6 Wheaton, 146.

(*g*) Bean *v.* Smith, 2 Mason, 252; Dexter *v.* Smith, Ibid. 303.

(*h*) Bank of United States *v.* Planters' Bank of Georgia, 9 Wheaton, 904.

(*i*) Acts of Congress of September 24th, 1789, sec. 11, 21, 22; and March 3d, 1803, c. 40, sec. 2.

(*a*) Act of Congress of September 24th, 1789, sec. 12. In Smets *v.* Williams, 4 Paige, 364, it was declared, that the amount of the original claim of the plaintiff, and not the amount ultimately found due, determined the jurisdiction of the Court of Chancery of New York, where it was limited to a certain sum.

(*b*) Acts of April 17th, 1800, c. 25, sec. 3; of February 15th, 1819, sec. 1, and of July 4th, 1836, c. 357, sec. 17; act of March 2d, 1833, entitled, *further to provide for the collection of duties on imports*, c. 57, sec. 2.

[4] When an indorsee of a paper, other than a foreign bill of exchange, sues a remote indorser, and is obliged to trace his title through intermediate indorsers, the United States Circuit Court has no jurisdiction, unless it be shown that all the intermediate persons could have sustained an action in the United States Circuit Court to recover the contents of the paper. Campbell *v.* Jordan, 1 Hemp. C. C. R. 534.

[1] See Hubbard *v.* Northern R. R. Co. 25 Vermont, 725.

[2] The mere fact that the subject-matter of a contract is a patent right, does not bring it within the jurisdiction of the courts of the United States. Burr *v.* Gregory, 2 Paine

diction in cases of copyrights applies, without regard to the character of the parties, or the amount in controversy; and with respect to the jurisdiction of the circuit courts, it may be laid down as the settled doctrine, that they are courts of *limited*, though not of *inferior* jurisdiction; and it is necessary, therefore, that there should appear upon the record of a circuit court, the facts or circumstances which give jurisdiction, either expressly or by necessary legal intendment. (*c*)

(3.) The district as well as the circuit courts are derived from the power granted to Congress by the constitution, of constituting tribunals inferior to the Supreme Court. (*d*) District Courts. The United States are at present divided into thirty-five districts, which generally consist of an entire state; but in New York, Pennsylvania, Virginia, North Carolina, South Carolina, Tennessee, Louisiana, Mississippi, and Alabama, there are more districts than one. A court is established in each district, with some exceptions, consisting of one judge, who holds annually, in most of them, four stated terms, and in some of them only three, or two, or one; and he holds, also, special courts in his discretion. There are at present only twenty-nine district judges; and it seems to be practically settled, since the act of 1801, that Congress may, in their discretion, abolish the inferior courts, and create new ones under a different organization.

The district courts have, exclusive of the state courts, * cog- * 304

(*c*) Turner *v.* The Bank of North America, 4 Dallas, 11; McCormick *v.* Sullivant, 10 Wheaton, 192. See, also, *post*, p. 314. The circuit courts are not authorized to issue writs of *mandamus*, except when necessary for the exercise of their acknowledged jurisdiction. M'Intire *v.* Wood, 7 Cranch, 504. It will therefore lie to a district court refusing to proceed to judgment in a case subject to the appellate jurisdiction of the Circuit Court. Smith *v.* Jackson, 1 Paine C. C. 453. It is a general principle of the common law, that where a limited authority is given, if the party to whom it is given extends his jurisdiction to objects not within it, his warrant will be no protection to the officers who act under it. Morrell *v.* Martin, 3 Mann. & Gr. 581.

(*d*) Art. 1, sec. 8.

C. C. 426; Goodyear *v.* Day, 1 Blatchf. C. C. 565; Sherman *v.* The Champlain Transp. Co. 31 Vermont, 163. The jurisdiction of the circuit courts extends to cases arising under the patent laws irrespective of the citizenship of the parties or of the amount involved. Allen *v.* Blunt, 1 Blatchf. C. C. 480. But the act giving jurisdiction to circuit courts in patent cases, without regard to citizenship, has not changed the provision of the Judiciary Act of 1789, providing that no civil suit shall be brought in a circuit or district court, against an inhabitant of the United States, in any other district than that of which he is an inhabitant or in which he shall be found at the time of serving the writ. Chaffee *v.* Hayward, 20 How. U. S. 208.

nizance of all lesser crimes and offences, cognizable under the authority of the United States, and committed within their respective districts, or upon the high seas, and which are punishable by fine not exceeding one hundred dollars, by imprisonment not exceeding six months, or when corporal punishment, not exceeding thirty stripes, is to be inflicted. (*a*) They have also exclusive original cognizance of all civil causes of admiralty, and maritime jurisdiction, including all seizures under imposts, navigation, or trade laws of the United States, where the seizures are made upon the high seas, or on waters within their districts navigable from the sea with vessels of ten or more tons burden; (*b*) and also of all other seizures made under the laws of the United States; and also of all suits for penalties and forfeitures incurred under those laws. They have also cognizance, concurrent with the circuit courts and the state courts, of causes where an alien sues for a tort committed in violation of the law of nations, or of a treaty of the United States; and of all suits at common law, in which the United States are plaintiffs, and the matter in dispute amounts, exclusive of costs, to two hundred dollars. They have jurisdiction, likewise, exclusive of the courts of the several states, of all suits against consuls or vice-consuls, except for offences above the magnitude which has been mentioned. (*c*) They have also cognizance of complaints by whomsoever instituted, in cases of captures made within the waters of the United States, or within a marine league of its coast; (*d*) and to repeal patents unduly obtained. (*e*)

(*a*) By the acts of Congress of August 23d, 1842, c. 188, and of August 8th, 1846, c. 98, the district courts were declared to have concurrent jurisdiction with the circuit courts, of all crimes and offences against the United States, the punishment of which is not capital.

(*b*) The *exclusive* original cognizance of all civil causes of admiralty and maritime jurisdiction is understood to be exclusive *as between the district and circuit courts*, and that the jurisdiction may be concurrent with courts of common law, in cases in which a common-law remedy may be adequate and proper, inasmuch as the Judiciary Act of 1789, sec. 9, when on this very point, "saves to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it."

(*c*) Act of Congress of September 24th, 1789, c. 20, sec. 9. By act of Congress of August 8th, 1846, c. 105, the district and circuit courts, and the commissioners to take affidavits, &c., have jurisdiction, as justices of the peace, against offenders against the United States, and, on the application of foreign consuls and commercial agents, to enforce their awards and decrees by arrest and imprisonment, &c.

(*d*) Act of April 20th, 1818, c. 88, sec. 7.

(*e*) Act of February 21st, 1793, c. 49, sec. 10. By the act of Congress of August

The judges of the district courts have, also, in cases where the party has not had a reasonable time to apply to the Circuit Court, as full power to grant writs of injunction to operate within their respective districts, as is exercised by the judges of the Supreme Court, and to continue until the *next Circuit * 305
Court. (*a*) They may also grant injunctions, in particular cases, under the Act *for the better organization of the treasury department.* (*b*)

In addition to these general powers vested in the district courts, they have, in those cases where the districts are so situated as not to permit conveniently the presence of a judge of the Supreme Court, the powers of a circuit court superadded to their ordinary powers of a district court. (*c*)

To guard against the inconvenience of a difference of opinion between the circuit judge and the district judge, when holding together a circuit court, it is provided by law, that in all cases of appeal or error, from the district to the circuit court, judgment is to be rendered in conformity to the opinion of the judge of the Supreme Court presiding in such circuit court. And in all other cases of a disagreement of opinion between the circuit and district judges, the point may be certified into the Supreme Court for its decision;[1] but in no case shall imprisonment be allowed, or punishment be inflicted, where the judges of the Circuit Court are divided in opinion upon the question. (*d*)

The superior courts of the several territories of the United States, in which no district court is established, have the enlarged jurisdiction of circuit courts, subject to revision by writ of error and appeal to the Supreme Court. (*e*) The district and territorial judges of the United States are required to reside within their

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23d, 1842, c. 188, the district courts, as courts of admiralty, and the circuit courts, as courts of equity, are to be deemed always open for the purpose of filing pleadings and issuing processes, and for interlocutory motions and orders.

(*a*) Act of February 13th, 1807, c. 13, sec. 1.

(*b*) Act of Congress of May 15th, 1820, c. 107, sec. 4 and 5.

(*c*) Act of February 19th, 1831, c. 28.

(*d*) Act of April 29th, 1802, c. 31, sec. 5, 6.

(*e*) Act of March 3d, 1805, c. 38, sec. 1.

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[1] The question upon which the disagreement takes place must be *specifically* stated. It is not sufficient to certify, generally, that the judges disagreed upon the whole case as to what judgment should be rendered. Sadler *v.* Hoover, 7 How. U. S. 646.

respective jurisdictions; and no federal judge can act as counsel, or be engaged in the practice of the law. (*f*)

*306 *(4.) The state courts are, in some cases, invested, by acts of Congress, with the cognizance of cases arising under the laws of the United States. By the acts of March 8th, 1806, and April 21st, 1808, and March 3d, 1815, the county courts within or adjoining the revenue districts in certain parts of the states of New York, Pennsylvania, and Ohio, were authorized to take cognizance of prosecutions for fines, penalties, and forfeitures, arising under the revenue laws of the United States; and the state or county courts adjoining any collection district, in relation to taxes or internal duties which may, at any time hereafter, be assessed, have cognizance of all suits for taxes, duties, fines, penalties, and forfeitures, arising thereon. (*a*)

Duties vested in state courts.

In attending to this general survey of the organization of the judiciary establishment of the United States, it will be perceived, that all the great features of the system are to be found in the act of Congress which was passed in September, 1789, at the first session of the first Congress under the present constitution. That act has stood the test of experience since that time, with very little alteration or improvement; and this fact is no small evidence of the wisdom of the plan, and of its adaptation to the interest and convenience of the country. The act of 1789 was the work of much profound reflection, and of great legal knowledge; and the system then formed and reduced to practice has been so successful and so beneficial in its operation, that the administration of justice in the federal courts has been constantly rising in influence and reputation.

The principal officers of the courts are attorneys and counsellors, clerks and marshals.

(1.) Attorneys and counsel are regularly admitted by the several courts, to assist the parties in their pleadings, and in the conduct of their causes in those cases in which the parties do not appear and manage their own causes personally, *as they are expressly permitted to do. (*a*) This privilege conceded to parties, though reasonable in itself,

Attorneys and counsel.

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(*f*) Act of December 18, 1812, sec. 1.

(*a*) *Vide infra*, pp. 400–405.

(*a*) Act of Congress of September 24th, 1789, sec. 35.

is, upon the whole, useless; and the necessity of a distinct profession, to render the application of the law easy and certain to every individual case, has always been felt in every country under the government of written law. As property becomes secure, and the arts are cultivated, and commerce flourishes, and when wealth and luxury are introduced, and create the infinite distinctions and refinements of civilized life, the law will gradually and necessarily assume the character of a complicated science, requiring for its application the skill and learning of a particular profession. After the publication of the twelve tables, suitors at Rome were obliged to resort to the assistance of their patrons, and judicial proceedings became the study and practice of a distinct and learned body of men. (*b*) The division of advocates into attorneys and counsel has been adopted from the prevailing usage in the English courts. The business of the former is to carry on the practical and more mechanical parts of the suit, and of the latter to draw or review and correct the special pleadings, to manage the cause at the trial, and also during the whole course of the suit, to apply established principles of law to the exigencies of the case. In the Supreme Court of the United States, the two degrees of attorney and counsel are kept separate, and no person is permitted to practice both as attorney and counsellor in that court. This was by a rule of the court in February, 1790; and when, afterwards, in August, 1801, the court declared that counsellors might be admitted as attorneys, on taking the usual oath, this did not mean or imply, that if a counsellor was thus admitted as attorney, he could continue to act as counsellor. He must make his election between the two degrees. In all the other courts of the United States, as well as in the courts
* of New York and the other states, the same person can * 308
be admitted to the two degrees of attorney and counsel, and exercise the powers of each. (*a*)

(*b*) Gravina, de Ortu et Prog. Jur. Civ. sec. 33, 40.

(*a*) In the convention which met in the year 1846 to revise the constitution of New York, there was a strong effort made to remove all impediments to the free admission of all persons to the courts of justice to act as counsel and attorneys. But the character and utility of the profession were saved, and the attempted innovation resulted in the constitutional provision, that "any male citizen of the age of 21 years, of good moral character, and who possesses the requisite qualifications of learning and ability, should be entitled to admission to practice in all the courts of this state." This was leaving the rule for admission to be essentially as it before existed, for it must of

Besides the ordinary attorneys, the statute has directed (*b*) that a meet person, learned in the law, be appointed to act as attorney-general of the United States; and besides special and incidental duties, it is made generally his duty to prosecute and conduct all suits in the Supreme Court in which the United States are concerned, and to give his advice and opinion upon questions of law, when required by the President or the heads of the departments.[1] Each judicial district has likewise a public officer to act as attorney for the United States in the district, and to prosecute all delinquents for crimes or offences cognizable under the authority of the United States, and to prosecute all civil actions within his district in which the United States are concerned. (*c*)

Clerks.

(2.) Clerks are appointed by the several courts, except that the clerk of the District Court is *ex officio* clerk of the Circuit Court in such district.[2] They have the custody of the seal and records, and are bound to sign and seal all process, and to record the proceedings and judgments of the courts. And this is a trust of so much importance, that, in addition to the ordinary

necessity belong to the courts, in which the admission is applied for, to judge of the satisfactory test of the good moral character and the requisite learning and ability of the candidates.

The courts ought to be vigilant and thorough in their examination respecting the ability, learning, and character of candidates for admission to practice as advocates in the courts. The interests of clients, the safety of the community, the purity, intelligence, and integrity of the administration of justice, and, indeed, the preservation of all our constitutional rights and liberties, are deeply concerned in the elevated, moral and educational standard and character of the members of the legal profession.

(*b*) Act of Congress of September 24th, 1789, sec. 35.

(*c*) Ibid. The act of Congress of 29th May, 1830, c. 153, sec. 1, instituted the office of *Solicitor of the Treasury;* and it is his duty to direct and superintend all orders, suits or proceedings in law or equity, for the recovery of money, chattels, and lands, in the name and for the use of the United States, and to have charge of all lands and other property conveyed to the United States in payment of debts, and of all trusts created for their use in payment of debts due to them, and to sell and dispose of lands assigned to the United States, or vested in them by mortgage in payment of debts; and to instruct the district attorneys, marshals, and clerks of the circuit and district courts, in relation to suits in which the United States are concerned. See the act aforesaid, in which his powers and duties are specifically detailed.

[1] See an elaborate exposition of the office and duties of the Attorney-General of the United States. Opinions of the Attorneys-General, vol. vii. 326.

[2] But by act of Congress of February 28th, 1839, (5 Statutes at Large, 322,) all the Circuit Courts of the United States have the appointment of their own clerks, and, in case of a disagreement between the judges, the appointment is to be made by the presiding judge.

oath of office, clerks are obliged to give security to the public for the faithful performance of their duty. (*d*) To guard still further against abuse of office, all moneys paid into the circuit or district courts, or received by the officers in cases pending therein, are required to be immediately deposited in bank; and no money can be drawn out of the bank, except by an order of a judge, to be signed by him, and certified of record by the clerk. The clerks are likewise bound, at every regular session of the courts, to exhibit an account of all the moneys remaining in court. (*e*)

* (3.) Marshals are analogous to sheriffs at common law. * 309 They are appointed for each judicial district by the President and Senate, for the term of four years, but are removable at pleasure; and it is the duty of the marshal to attend the district and circuit courts, and to execute, within the district, all lawful precepts directed to him, and to command all requisite assistance in the execution of his duty. There are also various special duties assigned by statute to the marshals. The appointment of deputies is a power incidental to the office, and the marshal is responsible *civiliter* for their conduct, and they are removable not only at his pleasure, but they are also by statute made removable at the pleasure of the district or circuit courts. (*a*) The act says, that the marshal shall be removable *at pleasure*, without saying by whom; and on the first organization of the government, it was made a question whether the power of removal, in case of officers appointed to hold at pleasure, resided anywhere but in the body which appointed, and of course whether the consent of the Senate was not requisite to remove. This was the construction given to the constitution while it was pending for ratification before the state conventions, by the author of The Federalist. "The consent of the Senate," The Federalist observes, (*b*) "would be necessary to displace as well as to appoint"; and he goes on to observe, that "those who can best estimate the value of a steady administration, will be most disposed to prize a provision which connects the official existence of public men with the approbation or disapprobation of that body, which, from the great permanency of its own composition, will, in all probability, be less subject to

Marshals.

(*d*) Act of Congress of September 24th, 1789, sec. 7.
(*e*) Act of March 3d, 1817, c. 108.
(*a*) Act of Congress of September 24th, 1789, sec. 27.
(*b*) No. 77.

inconstancy than any other member of the government." But the construction which was given to the constitution by Congress, after great consideration and discussion, was different. In
*310 the act for establishing *the treasury department, (a) the Secretary was contemplated as being removable from office by the President. The words of the act are, "That *whenever the Secretary shall be removed from office by the President of the United States*, or in any other case of vacancy in the office, the assistant shall act," &c. This amounted to a legislative construction of the constitution, and it has ever since been acquiesced in and acted upon, as of decisive authority in the case. It applies equally to every other officer of government appointed by the President and Senate, whose term of duration is not specially declared. It is supported by the weighty reason, that the subordinate officers in the executive department ought to hold at the pleasure of the head of that department, because he is invested generally with the executive authority, and every participation in that authority by the Senate was an exception to a general principle, and ought to be taken strictly. The President is the great responsible officer for the faithful execution of the law, and the power of removal was incidental to that duty, and might often be requisite to fulfil it.

This question has never been made the subject of judicial discussion; and the construction given to the constitution in 1789 has continued to rest on this loose, incidental, declaratory opinion of Congress, and the sense and practice of government since that time. It may now be considered as firmly and definitely settled, and there is good sense and practical utility in the construction. It is, however, a striking fact in the constitutional history of our government, that a power so transcendent as that is, which places at the disposal of the President alone the tenure of every executive officer appointed by the President and Senate, should depend upon inference merely, and should have been gratuitously declared by the first Congress in opposition to that high au-
*311 thority of The *Federalist; and should have been supported or acquiesced in by some of those distinguished men who questioned or denied the power of Congress, even to incorporate a national bank. (a)

(a) September 2d, 1789, sec. 7.

(z) As the instances of the exercise of the power of removal from office have been

The marshal is obliged to give security to the United States in twenty thousand dollars, for the faithful performance of the duties of his office by himself and his deputies,[1] and, together with his deputies, to take an oath of office. (*b*) By the common law, the death of the principal is a virtual repeal of the authority of the substitute or deputy; but to guard against any inconvenience which might arise from the operation of this principle, and to prevent the mischiefs of a vacancy in office, the act establishing the judicial courts has provided, that in case of the death of the marshal, his deputies shall continue in office, unless otherwise especially removed, and shall execute the same in the name of the deceased marshal, until another marshal shall be appointed and sworn. So, a marshal, when removed from office, or his term of office expires, may still execute all process in his hands, and he remains responsible for his prisoners until they are duly delivered over to his successor. (*c*)[2] And with respect to the custody of the prisoners, under the law of the United States, the marshal is directed to deliver his prisoners to the keeper of one of the jails of the state in which he is marshal, in cases where the legislature of the state, in conformity with the recommendation of Congress, have made it the duty of the jailers to receive them; but where they have not, the marshal, under the

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multiplied beyond all former example, under President Jackson's administration, the propriety of the concession of the power itself, by the first Congress, has been strongly questioned. It is the power of Congress, at any time, says a high authority, to correct the extensive operation of this executive power, by placing the appointment of *inferior officers* (and which would include ninety-nine out of a hundred of the lucrative offices of the government) in other hands. 3 Story's Comm. 394–397.

(*b*) Act of Congress of September 24th, 1789, sec. 27. By the act of Congress of April 10th, 1806, c. 21, the marshal's bonds are to be filed and recorded in the office of the clerk of the District Court or Circuit Court sitting within the district; and suits for the breach of the condition of any such bond may be instituted *in the name* and for the sole use of the person injured by a breach of the condition of the bond, and judgments on the bond are to remain as a security for the benefit of any person injured by the breach thereof.

(*c*) Ibid. sec. 28.

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[1] The deputy marshal is an officer of the District Court and amenable to its jurisdiction for malfeasance in office, and the jurisdiction may be exercised by summary order or attachment for contempt. The Bark Laurens and $ 20,000 in specie. 1 Abbott Adm. 508.

[2] Stewart *v.* Hamilton, 4 McLean, 534; United States *v.* Bank of Arkansas, Hempst. C. C. 460; Doolittle's Lessee *v.* Bryan, 14 How. U. S. 563.

direction of the district judge, is to provide his own place of security. (*d*)

(*d*) Resolutions of Congress, September 23d, 1789, and March 3d, 1791. See, also, the act of Congress of January 6th, 1800, and 1 Paine C. C. 368. The marshal is bound to take from the prisoner under United States process, a bond for the limits, as in the case for prisoners under state process.

LECTURE XV.

OF THE ORIGINAL AND APPELLATE JURISDICTION OF THE SUPREME COURT.

HAVING taken a general view of the great departments of the government of the United States, I proceed to a more precise examination of its powers and duties, and of the degree of subordination under which the state governments are constitutionally placed.

The constitution of the United States is an instrument containing the grant of *specific* powers, and the government of the Union cannot claim any powers but what are contained in the grant, and given either expressly, or by necessary implication. The powers vested in the state governments by their respective constitutions, or remaining with the people of the several states prior to the establishment of the constitution of the United States, continue unaltered and unimpaired, except so far as they are granted to the United States. We are to ascertain the true construction of the constitution, and the precise extent of the residuary authorities of the several states, by the declared sense and practice of the governments respectively, when there is no collision; and in all other cases where the question is of a judicial nature, we are to ascertain it by the decisions of the Supreme Court of the United States; and those decisions ought to be studied and universally understood, in respect to all the leading questions of constitutional law. (*a*) The people of the United States have declared the constitution to be the supreme law of the land, and it is entitled to universal and implicit obedience. Every act of Congress, and every act of the legislatures of the states, and every part of the constitution of any state, which are repugnant to the constitution * of the United States, are * 314 necessarily void. This is a clear and settled principle of constitutional jurisprudence. The judicial power of the Union is declared to extend *to all cases* in law and equity arising under the

Test of constitutional power.

(*a*) See *supra*, p. 243.

constitution; and to the judicial power it belongs, whenever a case is judicially before it, to determine what is the law of the land. The determination of the Supreme Court of the United States, in every such case, must be final and conclusive, because the constitution gives to that tribunal the power to decide, and gives no appeal from the decision.

With respect to the judicial power, it may be generally observed, as the Supreme Court declared, in the case of *Turner* v. *The Bank of North America*, (*a*) that the disposal of the judicial power, except in a few specified cases, belongs to Congress; and the courts cannot exercise jurisdiction in every case to which the judicial power extends, without the intervention of Congress, who are not bound to enlarge the jurisdiction of the federal courts to every subject which the constitution might warrant. So, again, it has been decided, (*b*) that Congress has not delegated the exercise of judicial power to the circuit courts, but in certain specific cases. Both the constitution and an act of Congress must *concur* in conferring power upon the circuit courts. A considerable portion of the judicial power, placed at the disposal of Congress by the constitution, has been intentionally permitted to lie dormant, by not being called into action by law. (*c*) The 11th section of the Judiciary Act of 1789, giving jurisdiction to the circuit courts, has not covered the whole ground of the constitution, and those courts cannot, for instance, issue a *mandamus*, but in those cases in which it may be necessary to the exercise of their jurisdiction. (*d*)

Original jurisdiction of the Supreme Court.

The original jurisdiction of the Supreme Court is very limited, and it has been decided that Congress has no power to extend it. (*e*) It is confined by the constitution to those cases which affect ambassadors, other public ministers and consuls, and to those in which a state is a party; (*f*)

* 315 and * it has been made a question, whether this original jurisdiction of the Supreme Court was intended by the constitution to be exclusive. The Judiciary Act of 1789 seems

(*a*) 4 Dallas, 8.

(*b*) M'Intire *v.* Wood, 7 Cranch, 504; Livingston *v.* Van Ingen, 1 Paine C. C. 45. United States *v.* Hudson & Goodwin, 7 Cranch, 32; United States *v.* Bevans, 3 Wheaton, 336.

(*c*) Conkling's Treatise, 2d edit. 68.

(*d*) Smith *v.* Jackson, 1 Paine C. C. 453.

(*e*) Marbury *v.* Madison, 1 Cranch, 137.

(*f*) Art. 3, sec. 2.

to have considered it to be competent for Congress to vest concurrent jurisdiction, in those specified cases, in other courts; for it gave a concurrent jurisdiction, in some of those cases, to the circuit courts. (*a*) In the case of *The United States* v. *Ravara*, (*b*) this point arose in the Circuit Court for Pennsylvania district, and it was held that Congress could vest a concurrent jurisdiction in other courts, of those very cases over which the Supreme Court had original jurisdiction; and that the word original was not to be taken to imply exclusive cognizance of the cases enumerated. But the opinion of the Supreme Court of the United States, in *Marbury* v. *Madison*, (*c*) goes far towards establishing the principle of exclusive jurisdiction in the Supreme Court in all those cases of original jurisdiction. This last case was considered, in *Pennsylvania* v. *Kosloff*, (*d*) as shaking the decision in the case of *Ravara;* and yet the question was still left in doubt by the Supreme Court, in the case of *The United States* v. *Ortega*, (*e*) and a decision upon it was purposely waived. (*f*)

Admitting that this original jurisdiction of the Supreme Court may be shared by other courts in the discretion of Congress, it has been decided, as we shall presently see, that this original jurisdiction cannot be enlarged, and that the Supreme Court cannot be vested, even by Congress, with any original jurisdiction in other cases than those described in the constitution.[1] It is the appellate jurisdiction of the Supreme Court that clothes it with most of its dignity and efficacy, and renders it a constant object of attention and solicitude on the * part of the governments * 316 and the people of the several states. (*a*)

(*a*) Act of Congress, September 24th, 1789, sec. 13. (*b*) 2 Dallas, 297.
(*c*) 1 Cranch, 137. (*d*) 5 Serg. & Rawle, 545.
(*e*) 11 Wheaton, 467.
(*f*) In the official opinion of the Attorney-General of the United States, in 1797, it was held, that the Supreme Court of the United States had no *criminal* jurisdiction, until given by statute, and that it was capable of having it conferred by law in the case of ambassadors, &c., as in the case of libels, &c. Opinions of the Attorneys-General, (July 27th, 1797,) vol. i. p. 42.
(*a*) The Imperial Chamber and the Aulic Council in the Germanic Constitution,

[1] Since the act of 1789, in all cases where original jurisdiction is given to the Supreme Court by the Constitution, the authority is exercised without further act of Congress to regulate process or confer jurisdiction. Commonwealth of Kentucky *v.* Dennison, Governor, &c. 24 How. U. S. 66. And see Chisholm's Executors, Georgia, 2 Dallas, 419.

Appellate jurisdiction.

(1.) The Supreme Court has appellate jurisdiction, in certain cases, over final decisions in the state courts, but it has no power to review its own decisions, either at law or in equity. (*b*)

We have seen (*c*) that, by the act of Congress of the 24th of September, 1789, sec. 25, a final judgment or decree in any suit in the highest court of law or equity of a state, where is drawn in question the validity of a treaty, and the decision is against its validity; or where is drawn in question the construction of a treaty, and the decision is against the title, right, or privilege set up or claimed under it, may be re-examined and reversed or affirmed in the Supreme Court of the United States, upon a writ of error; and, upon reversal, the cause may be remanded for final decision, or the Supreme Court may, at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution. The word *final*, in the Judiciary Act, is understood to apply to all judgments and decrees which *determine the particular cause;* and it is not to be confined to those judgments and decrees which are final so as to terminate all further or renewed litigation, in a new suit on the same right. (*d*) [1] Under this appellate authority, it was declared in the case of *Clerke* v. *Harwood*, (*e*) that if the highest court in a state reverse the judgment of a subordinate court, and, on appeal to the Supreme Court of the United States, the judgment of the highest state court be in its turn reversed, it becomes a mere nullity, and the mandate for execution may issue to the inferior state court. But, in the case of *Fairfax* v. *Hunter*, (*f*) a writ of error

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were tribunals of appellate jurisdiction only. It was the original law of Germany, that no man could be sued, except in the state or province to which he belonged. 1 Hallam on the Middle Ages, 371, 372.

(*b*) Washington Bridge Company *v.* Stewart, 3 How. U. S. 413.

(*c*) *Supra*, p. 299.

(*d*) Weston *v.* City Council of Charleston, 2 Peters U. S. 449. See Judge Conkling's Treatise on the Courts of the United States, 2d edit. p. 23, for a citation of the cases on this point. This Treatise of the learned judge is copious, accurate, and a very useful digest for the profession. The details of the practice of the courts of the United States, supported by a full review of the statutes, judicial decisions, and rules of the courts are excellent.

(*e*) 3 Dallas, 343. (*f*) 7 Cranch, 608.

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[1] See Forgay *v.* Conrad, 6 How. U. S. 201; Pulliam *v.* Christian, 6 How. U. S. 209.

from the Supreme Court of the United States was awarded to the Court of Appeals of Virginia, upon a judgment in * *317 that court against the right claimed under a construction of the treaties made with Great Britain in 1783 and 1794, and the judgment of the Court of Appeals was reversed, and the cause remanded, and the Court of Appeals below were required to cause the original judgment, which had been reversed in that court, to be carried into due execution. The Court of Appeals, when the cause came back to them, resolved that the appellate power of the Supreme Court of the United States did not extend to that court, and that so much of the act of Congress as extended the appellate jurisdiction of the Supreme Court to that court was not warranted by the constitution; and that the proceedings in the Supreme Court were *coram non judice* in relation to that court; and they consequently declined obedience to its mandate. A writ of error was awarded upon this refusal, and the cause came up again before the Supreme Court of the United States, in a case in which the judgment of the court below drew in question, and denied the validity of the statute of the United States, authorizing an appeal from a state court. (*a*)

A graver question could scarcely have arisen in that court, or one involving considerations of higher importance and delicacy, or more deeply affecting the permanency and tranquillity of the American Union. In the opinion which was delivered, the court observed, that the constitution unavoidably dealt in general language, and did not enter into a minute specification of powers, or declare the means by which those powers were to be carried into execution. This would have been a perilous and difficult, if not an impracticable task; and the constitution left it to Congress, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom and the public interest should require.

The judicial power of the United States is declared to extend to all cases arising under treaties made under the * authority of the United States. It was an absolute *318 grant of the judicial power in that case, and it was competent for the people of this country to invest the general gov-

(*a*) Martin *v.* Hunter, 1 Wheaton, 304.

ernment with that, or with any other powers they might deem proper and necessary, and to prohibit the states from the exercise of any powers which were, in their judgment, incompatible with the objects of the general compact. Congress were bound, by the injunctions of the constitution, to create inferior courts, in which to vest all that judicial jurisdiction which was exclusively vested in the United States, and of which the Supreme Court cannot take any other than an appellate cognizance. The whole judicial power must be at all times vested, either in an original or appellate form, in some courts created under the authority of the United States. The grant of the judicial power was absolute, and it was imperative upon Congress to provide for the appellate jurisdiction of the federal courts, in all the cases in which judicial power was exclusively granted by the constitution, and not given, by way of original jurisdiction, to the Supreme Court.

The court, in their examination of the judicial power, supposed that the constitution took a distinction between two classes of enumerated cases. It intended that the judicial power, either in an original or appellate form, should extend absolutely to *all cases* in law and equity arising under the constitution, the laws of the United States, and treaties made under their authority; and to all cases affecting ambassadors, other public ministers and consuls; and to all cases of admiralty and maritime jurisdiction; because these cases were of vital importance to the sovereignty of the Union, and they entered into the national policy, and affected the national rights, and the law and comity of nations. The original or appellate jurisdiction ought, therefore, to be commensurate with the mischiefs intended to be remedied, and the policy in view. But in respect to another class of cases, the constitution seemed, *ex industria*, to drop the word *all*, and to
*319 extend the jurisdiction of the *judiciary, not to all controversies, but to controversies in which the United States were a party, or between two or more states, or between citizens of different states, &c., and to leave it to Congress to qualify the jurisdiction, original or appellate, in such manner as public policy might dictate.[1] But whatever weight might be due to that

[1] In Florida *v.* Georgia, 17 How. U. S. 478, the jurisdiction of the Supreme Court over suits between states, or suits to which the United States are a party, is examined at length in the prevailing opinion of the court and in the dissenting opinions of the minority.

distinction, it was held to be manifest, that the judicial power was, unavoidably, in some cases, exclusive of all state authority, and, in all others, might be made so at the election of Congress. The Judiciary Act, throughout every part of it, and particularly in the 9th, 11th, and 13th sections, assumed, that in all cases to which the judicial powers of the United States extended, Congress might rightfully vest exclusive jurisdiction in their own courts. The criminal, and the admiralty and maritime jurisdiction, must be exclusive; and it was only in those cases where, previous to the constitution, state tribunals possessed jurisdiction independent of national authority, that they could now constitutionally exercise a concurrent jurisdiction.

The exercise of appellate jurisdiction was not limited by the constitution to the Supreme Court. Congress might create a succession of inferior tribunals, in each of which it might vest appellate as well as original jurisdiction. The appellate jurisdiction of the Supreme Court, in cases where it had not original jurisdiction, was declared to be subject to such exceptions and regulations as Congress might prescribe. It remained, therefore, entirely in the discretion of Congress to cause the judicial power to be exercised in every variety of form of appellate jurisdiction, and the appellate power was not limited to cases pending in the courts of the United States. If it had been limited to cases in those courts, it would necessarily follow that the jurisdiction of the federal courts must have been exclusive of state courts, in all the cases enumerated in the constitution. If the judicial power of the United States extends to all cases arising under the constitution, laws, and treaties of the Union, and to all cases of admiralty and maritime jurisdiction, * the state courts *320 could not, consistently with the express grant in the constitution, entertain any jurisdiction in those cases without the right of appeal. If the state courts might entertain concurrent jurisdiction over any of those cases without control, then the appellate jurisdiction of the United States, as to such cases, would have no existence, which would be contrary to the manifest intent of the constitution. The appellate power of the federal courts must extend to the state courts, so long as the state courts entertain any concurrent jurisdiction over the cases which the constitution has declared shall fall within the cognizance of the judicial power. It is very plain that the constitution did contemplate

that cases within the judicial cognizance of the United States would arise in the state courts, in the exercise of their ordinary jurisdiction; and that the state courts would incidentally take cognizance of the cases arising under the constitution, the laws, and the treaties of the United States; and as the judicial power of the United States extended to all such cases, by the very terms of the constitution, it followed, as a necessary consequence, that the appellate jurisdiction of the courts of the United States must and did extend to the state tribunals, and attach upon every case within the cognizance of the judicial power.

All the enumerated cases of federal cognizance are those which touch the safety, peace, and sovereignty of the nation, or which presume that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct or control the regular administration of justice. The appellate power, in all these cases, is founded on the clearest principles of policy and wisdom, and is deemed requisite to fulfil effectually the great and beneficent ends of the constitution. It is likewise necessary, in order to preserve uniformity of decision throughout the United States, upon all subjects within the purview of the constitution; and the mischiefs of opposite constructions and contradictory decisions in the different states, on all these points of general concern, would be deplorable.

*321 * The right of removal of a cause from a state court by a defendant, who is entitled to try his rights and assert his privileges in the national forum, is also the exercise of appellate jurisdiction; and the right of removal of a cause may exist before or after judgment, in the discretion of Congress. The Supreme Court, by a train of reasoning which appears to be unanswerable and conclusive, came to the decision, that the appellate power of the United States did extend to cases pending in the state courts, and that the 25th section of the Judiciary Act of 1789, authorizing the exercise of this jurisdiction in the specified cases by a writ of error, was supported by the letter and spirit of the constitution. The judgment of the Court of Appeals, in Virginia, rendered on the mandate in the cause, and denying the appellate jurisdiction of the Supreme Court, was consequently reversed, and the judgment of the District Court in Virginia, which the Court of Appeals in Virginia had reversed, was affirmed.

Whether the Supreme Court had authority to issue the compulsory process of *mandamus* to the state courts, to enforce the judgment of reversal, was a question which the court did not think it necessary to discuss or decide; and one of the judges, in the separate opinion which he gave in the cause, seemed to think that the Supreme Court, in the exercise of its appellate jurisdiction, was supreme over the parties and over the case, but that it had no compulsory control over the state tribunals. The court itself gave no intimation of an opinion whether it could or could not lawfully resort to compulsory or restrictive process, operating *in personam* upon the state tribunals; and it was no doubt deemed discreet not to assert more authority constitutionally vested in the court than was necessary for the occasion. If the appellate jurisdiction be founded, as it no doubt was in that case, on a solid basis, it would seem to carry with it, as of course, all the coercive power incident to every such jurisdiction, and requisite to support it.

* (2.) Another question which was largely discussed * 322 and profoundly considered by the Supreme Court, was touching its authority to issue a *mandamus* when not arising in a case under its appellate jurisdiction, and when not required in the exercise of its original jurisdiction. In the case of *Marbury* v. *Madison*, (*a*) the plaintiff had been nominated by the President, and, by and with the advice and consent of the Senate, had been appointed a justice of the peace for the District of Columbia, and the appointment had been made complete and absolute by the President's signature to the commission, and the commission had been made complete by affixing to it the seal of the United States. The Secretary of State, after all this, withheld the commission, and the withholding of it was adjudged to be a violation of a vested legal right, for which the plaintiff was entitled to a remedy by *mandamus;* and the only question was, whether the *mandamus* could constitutionally issue from the Supreme Court. (*b*)

Writ of mandamus.

(*a*) 1 Cranch, 137.

(*b*) In the case of Kendall *v.* The United States, 12 Peters U. S. 524, it was decided, that the Circuit Court for the District of Columbia had authority to issue and enforce obedience to a *mandamus*, requiring the performance of a mere ministerial act by the Postmaster-General, and which neither he nor the President had any authority to deny or control; for the Postmaster-General is not subject to the direction and control of the

The Judiciary Act, sec. 13, authorized the Supreme Court to issue writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States. There was no doubt that the act applied to the case, and gave the power, if the law was constitutional; but the court was of opinion that the act, in this respect, was not warranted by the constitution, because the issuing of a *mandamus* in this case would be an exercise of original jurisdiction not within the constitution, and Congress had not power to give *original* jurisdiction to the Supreme Court in other cases than those described in the constitution. It had not authority to give to the Supreme Court appellate jurisdiction, where the constitution had declared that its jurisdiction should be original, nor original jurisdiction where the constitution had declared it should be appellate. To enable the court to issue a *man-*
* 323 *damus*, it must be shown to be an exercise, or * necessary to an exercise, of appellate jurisdiction.

The Supreme Court may accordingly issue a *mandamus* to a Circuit Court of the United States, commanding it to sign a bill of exceptions, for this is an exercise of power warranted by the principles and usages of law. (*a*)

(3.) The constitution gives to the Supreme Court original ju-

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President, with respect to the execution of duties imposed upon him by law.[1] The President has no dispensing power over the law, nor will a *mandamus* lie to correct the erroneous judgment of an inferior court. It is not the process to review judicial errors of any kind. Ex parte Hoyt, 13 Peters U. S. 279; Ex parte Whitney, 13 Peters U. S 404. This is a settled principle in English and American law. The King *v.* Justices of Monmouthshire, 7 Dowl. & Ryl. 334; Judges of Oneida *v.* The People, 18 Wendell, 79; The People *v.* Judges of Dutchess C. P. 20 Wendell, 658.

(*a*) Ex parte Crane and another, 5 Peters U. S. 190. In the case of Barry *v.* Mercein, 5 How. U. S. 103, in the Supreme Court of the United States, at Washington, January, 1847, it was adjudged that a writ of error would not lie to the Supreme Court, upon the judgment of a Circuit Court, refusing to grant a writ of *habeas corpus*, in a case of a father claiming from the mother his infant daughter. The case did not come within the provision of the 22d section of the Judiciary Act of 1789. The case was not within the limits assigned by the act of Congress to the appellate jurisdiction of the Supreme Court.

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[1] A *mandamus* against the Secretary of the Navy will not lie, at the instance of an officer to enforce the payment of his salary. The duties of the Secretary in making such payments are not merely ministerial, but are official and to some extent discretionary, and the judicial department has no power to interfere with their discharge. Brashear *v.* Mason, 6 How. U. S. 92. See, also, Reeside *v.* Walker, 11 How. U. S. 272. United States *v.* Guthrie, 17 How. U. S. 284.

risdiction in those cases in which a state shall be a party; and in *Fowler* v. *Lindsey*, (*b*) the question arose, *when* a state was to be considered a party.[1] The parties in that suit claimed title to lands under grants from different states. The plaintiff brought his ejectment in the Circuit Court of Connecticut, claiming title under a grant from that state, and under a claim that the lands lay within the jurisdiction of that state. The defendant claimed title under a grant from New York, and on the ground that the lands lay within the rightful as well as actual jurisdiction of New York. The court laid down this rule on the subject of the jurisdiction of the Supreme Court, on account of the interest that a state has in the controversy, that it must be a case in which a state is either nominally or substantially the party; and that it is not sufficient that the state may be consequentially affected, as being bound to make retribution to her grantee upon the event of eviction. Though there may be a controversy relative to soil or jurisdiction between two states, yet if that controversy occurs in a suit between two individuals, to which neither of the states is a party upon the record, it is not a case within the *original* jurisdiction of the Supreme Court, because the states may contest the right of soil in the Supreme Court at any time, notwithstanding a decision in the suit between the individuals. Nor will a decision as to the right of soil between individuals affect the right of the state as to *jurisdiction; and that jurisdiction may * 324 remain unimpaired, though the state may have parted with the right of soil. In such a case the Supreme Court would not allow an injunction, on a bill filed by the state of New York against the state of Connecticut, to stay proceedings in the ejectment suit between individuals, though a general claim of soil and jurisdiction was involved in the private suit, because the state of New York was not a party to the suit in the Circuit Court, nor interested in the decision. (*a*)

When a state is a party.

(*b*) 3 Dallas, 411.

(*a*) New York *v.* Connecticut, 4 Dallas, 3. In the case of the State of Rhode Island *v.* The State of Massachusetts, 12 Peters U. S. 657, it was decided, after a very elaborate discussion, that the Supreme Court had jurisdiction to ascertain and establish boundaries between two states, and to restore and confirm rights of sovereignty and jurisdiction.

[1] A suit by or against the governor of a state in his official capacity is a suit by or against a state, within the meaning of the constitution.

Appellate jurisdiction depends on Congress.

(4.) The appellate jurisdiction of the Supreme Court exists only in those cases in which it is affirmatively given. In the case of *Wiscart* v. *Dauchy*, (*b*) the Supreme Court considered that its whole appellate jurisdiction depended upon the regulations of Congress, as that jurisdiction was given by the constitution in a qualified manner. The Supreme Court was to have appellate jurisdiction, "with such exceptions and under such regulations as Congress should make"; and if Congress had not provided any rule to regulate the proceedings on appeal, the court could not exercise an appellate jurisdiction; and if a rule be provided, the court could not depart from it. In pursuance of this principle, the court decided, in *Clarke* v. *Bazadone*, (*c*) that a writ of error did not lie to that court from a court of the United States territory northwest of the Ohio, because the act of Congress had not authorized an appeal or writ of error from such a court. It was urged, that the judicial power extended to all cases arising under the constitution, and that where a Supreme Court had not original, it had appellate jurisdiction, with such exceptions and under such regulations as Congress should make; and that the appellate power was derived from the constitution, and must be full and complete, in all cases appertaining to
* 325 the federal judiciary * where Congress had not by law interfered and controlled it, by exceptions and regulations. The court, however, adhered to the doctrine which they had before laid down, and proceeded upon the principle, that though the appellate powers of the court were given by the constitution, they were limited entirely by the judiciary statutes, which are to be understood as making exceptions to the appellate jurisdiction of the court, and to imply a negative on the exercise of such a power, in every case but those in which it is affirmatively given and described by statute. This was the principle also explicitly declared in the case of *The United States* v. *More*, (*a*) and in the case of *Durousseau* v. *The United States*. (*b*) In the first of those cases, the rule of construction was carried to the extent of holding that no appeal or writ of error lay in a criminal case from the Circuit Court of the District of Columbia, because the appellate jurisdiction, as to that district, applied, by the terms of the statute, to civil cases only. The rule was afterwards, in *Ex parte Kear-*

(*b*) 3 Dallas, 321.
(*c*) 1 Cranch, 212.
(*a*) 3 Cranch, 159.
(*b*) 6 Cranch, 307.

ney, (*c*) laid down generally, that the Supreme Court had no appellate jurisdiction from circuit courts in criminal cases confided to it by the laws of the United States.[1] Nor has it any appellate jurisdiction over a judgment of the circuit courts, in cases brought before it by *writ of error* from a district court, though it has over judgments and decrees of the circuit courts, in suits brought before them by *appeal* from the district courts. (*d*)

(5.) The constitution says, that the judicial power shall extend to all cases arising under the constitution, laws, and treaties of the United States; and it has been made a question, as to what was *a case* arising under a treaty. In * *Owings* v. *Norwood*, (*a*) there was * 326 an ejectment between two citizens of Maryland, for lands in that state; and the defendant set up an outstanding title in a British subject, which he contended was protected by the British treaty of 1794. The Court of Appeals decided against the title thus set up; and the Supreme Court of the United States held that not to be a case within the appellate jurisdiction of the court, because it was not a case arising under the treaty. The treaty itself was not drawn in question, either directly or incidentally. The title in question did not grow out of the treaty, and as the claim was not under the treaty, the title was not protected by it; and whether the treaty was an obstacle to the recovery, was then a question exclusively for the state court. (*b*) [2]

Judicial power confined to cases arising under the constitution, treaties, and laws.

(*c*) 7 Wheaton, 38; Ex parte Watkins, 3 Peters U. S. 193; 7 Peters U. S. 568, S. P.

(*d*) United States *v.* Goodwin, 7 Cranch, 108; United States *v.* Gordon, Ibid. 287. But see *supra*, p. 199, now altered by act of Congress. Mr. Justice Story, in the case Ex parte Christy, 3 How. U. S. 292, 317, stated that no appeal was given or lies from the judgments either of the District or Circuit Courts in criminal cases. So it was adjudged that the Supreme Court has no power of appeal from the decrees of the District Court sitting in bankruptcy, nor any power to issue a prohibition, except when the District Court is proceeding as a court of admiralty and maritime jurisdiction. See, also, *infra*, p. 383.

(*a*) 5 Cranch, 344.

(*b*) A case, in the sense of the Constitution, says Mr. Justice Story, (Commentaries

[1] The U. S. Sup. Court has no power of revision of the judgment of the district and circuit courts, in criminal cases; but it has jurisdiction in criminal as well as civil controversies in cases where judgment is not rendered in the circuit courts by reason of a difference in the opinions of the judges holding such courts, and a certificate of the division is made pursuant to the amendatory act of 1802. Forsyth *v.* The United States, 9 How. U. S. 571.

[2] Henderson *v.* Tennessee, 10 How. U. S. 311; and see Gill *v.* Oliver's Executors, 11 How. U. S. 529; Williams *v.* Oliver, 12 How. U. S. 111.

(6.) The Judiciary Act of 1789 required, on error or appeal from a state court, that the error assigned appear on the face of the record, and immediately respect some question affecting the validity or construction of the constitution, treaties, statutes, or authorities of the Union. Under this act, it is not necessary that the record should state in terms the misconstruction of the authority of the Union, or that it was drawn in question; but it must show some act of Congress applicable to the case, to give to the Supreme Court appellate jurisdiction. It will be sufficient, if it be apparent that the case, in point of law, involved one of the questions on which the appellate jurisdiction is made to depend by the 25th section of the Judiciary Act of 1789, and that the state court must have virtually passed upon it. (*c*) But the court has been so precise upon this point, that in *Miller* v. *Nicholls*, (*d*) notwithstanding it was believed that an act of Congress, giving the United States priority in cases of insolvency, had been disregarded, yet, as the fact of insolvency *did not appear upon record, the court *327 decided that they could not take jurisdiction of the case.

Appellate jurisdiction confined to matter on the record.

In the exercise of their appellate jurisdiction, the Supreme Court can only take notice of questions arising on *matters of fact appearing upon the record;* and in all cases where jurisdiction depends on the party, it is the party named in the record. (*a*)

(7). The appellate jurisdiction may exist, though a state be a party, and it extends to a final judgment in a state court, on a case arising under the authority of

It exists, though a state be a party.

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on the Constitution, vol. iii. p. 507,) is a suit in law or equity, and arises when some subject touching the Constitution, laws, or treaties of the United States is submitted to the courts by a party, who asserts his rights in the form prescribed by law. See, also, 9 Wheaton, 819, and 9 Peters U. S. 224.

(*c*) Craig *v.* State of Missouri, 4 Peters U. S. 410. In Crowell *v.* Randell, 10 Peters U. S. 368, the Supreme Court reviewed all the cases on the appellate jurisdiction of the court from the state courts; and it was decided, that to give the court appellate jurisdiction, two things must have occurred, and be apparent in the record, or by necessary inference from it: (1.) that some one of the questions stated in the 25th section of the Judiciary Act of 1789 *did arise* in the court below, and (2.) that a decision was actually made thereon by the same court in the manner required by the section. If both of these do not appear on the record, the appellate jurisdiction fails. 12 Peters U. S. 507, S. P. Ocean Ins. Co. *v.* Polleys, 13 Peters U. S. 157, S. P. Coons *v.* Gallager, 15 Peters U. S. 18, S. P. See, also, Conkling's Treatise, (2d edit.) 26.

(*d*) 4 Wheaton, 311.

(*a*) Governor of Georgia *v.* Madrazo, 1 Peters U. S. 110. Hickie *v.* Starke, Ibid. 98. Fisher *v.* Cockerell, 5 Ibid. 248.

the Union. The appellate powers of the federal judiciary over the state tribunals was again, and very largely discussed, in the case of *Cohens* v. *Virginia*; (*b*) and the constitutional authority of the appellate jurisdiction of the Supreme Court was vindicated with great strength of argument and clearness of illustration. The question arose under an act of Congress instituting a lottery in the District of Columbia, and the defendant below was criminally prosecuted for selling tickets in that lottery, contrary to an act of the legislature of Virginia. Judgment was rendered against him, in the highest court of the state in which the cause was cognizable, though he claimed the protection of the act of Congress. A writ of error was brought upon that judgment into the Supreme Court of the United States, on the ground that the prosecution drew in question the validity of the statute in Virginia, as being repugnant to a law of the United States, and that the decision was in favor of the state law. It was made a great point in the case, whether the Supreme Court had any jurisdiction.

The court decided, that its appellate jurisdiction was not excluded by the character of the parties, one of them being a state, and the other a citizen of the state. Jurisdiction was given to the courts of the Union in two classes of cases. *In *328 the first, their jurisdiction depended on the character of the cause, whoever might be the parties; and, in the second, it depended entirely on the character of the parties, and it was unimportant what might be the subject of controversy. The general government, though limited as to its objects, was supreme with respect to those objects. It was supreme in all cases in which it was empowered to act. A case arising under the constitution and laws of the Union was cognizable in the courts of the Union, whoever might be the parties to that case. The sovereignty of the states was limited or surrendered, in many cases, where there was no other power conferred on Congress than a constructive power to maintain the principles established in the constitution. One of the instruments by which that duty might be peacefully performed was the judicial department. It was authorized to decide *all cases* of every description, arising under the constitution, laws, and treaties of the Union; and from this general grant of jurisdiction, no exception is made of those

(*b*) 6 Wheaton, 264.

cases in which a state may be a party. It was likewise a political axiom, that the judicial power of every well-constituted government must be coextensive with the legislative power, and must be capable of deciding every judicial question which grows out of the constitution and laws. The most mischievous consequences would follow, from the absence of appellate jurisdiction over a state court, where a state was a party, for it would prostrate the government and laws of the Union at the feet of every state. The powers of the government could not be executed by its own means, in any state disposed to resist its execution by a course of legislation. If the courts of the Union could not correct the judgments of the state courts, inflicting penalties under state laws, upon individuals executing the laws of the Union, each member of the confederacy would possess a *veto* on the will of the whole. No government ought to be so defective in its organization, as not to contain within itself the means of
*329 securing the execution of its own laws. If *each state was left at liberty to put its own construction upon the constitutional powers of Congress, and to legislate in conformity to its own opinion, and enforce its opinion by penalties, and to resist or defeat, in the form of law, the legitimate measures of the Union, it would destroy the constitution, or reduce it to the imbecility of the old confederation. To prevent such mischief and ruin, the constitution of the United States, most wisely and most clearly, conferred on the judicial department the power of construing the constitution and laws in every case, and of preserving them from all violation from every quarter, as far as judicial decisions could preserve them.

The case before the court was one in which jurisdiction depended upon the character of the cause, as it was a case arising under the law of the Union. It was not an ordinary case of a controversy between a state and one of its citizens, for there the jurisdiction would depend upon the character of the parties. The court concluded, that the appellate power did extend to the case, though a state was a party, because it was a case touching the validity of an act of Congress, and the decision of the state court was against its validity; and in all cases arising under the constitution, laws, and treaties of the Union, the jurisdiction of the court may be exercised in an appellate form, though a state be a party.

The court observed, that the amendment to the constitution, de-

claring that the judicial power was not to be construed to extend to any suit in law or equity commenced or prosecuted against a state by individuals, did not apply to a writ of error, which was not a suit against a state, within the meaning of the constitution; and the jurisdiction of the Supreme Court, in cases arising under the constitution, laws, and treaties of the Union, may be exercised by a writ of error brought upon the judgment of a state court. The United States are one nation and one people, as to all cases and powers given by the constitution, and the judicial power *must be competent not only to decide on the *330 validity of the constitution or law of a state, if it be repugnant to the constitution or to a law of the United States, but also to decide on the judgment of a state tribunal enforcing such unconstitutional law. The federal courts must either possess exclusive jurisdiction in all cases affecting the constitution and laws and treaties of the Union, or they must have power to revise the judgments rendered on them by the state tribunals. If the several state courts had final jurisdiction over the same cases, arising upon the same laws, it would be a hydra in government, from which nothing but contradiction and confusion could proceed. Nothing can be plainer than the proposition, that the Supreme Court of the nation must have power to revise the decisions of local tribunals on questions which affect the nation, or the most important ends of the government might be defeated, and we should be no longer one nation for any efficient purpose. The doctrine would go to destroy the great fundamental principles on which the fabric of the Union stands. (*a*)

We have now finished the review of the most important points that have arisen in the jurisprudence of the United States, on the subject of the original and appellate jurisdiction of the Supreme Court. So far as the powers of that court, under the constitution, and under the 25th section of the Judiciary Act of 1789, have been drawn in question, they have been maintained with great success, and with an equal display of dignity and discretion.

(*a*) In Williams *v.* Norris, and Montgomery *v.* Hernandez, 12 Wheaton, 117, 129, under the 25th section of the Judiciary Act of 1789, c. 20, it was held, that the Supreme Court has no appellate jurisdiction, unless the decision in the state court be *against* the right or title set up by the party under the constitution or statute of the United States, and the title depended thereon; or unless the decision be in *favor* of a state law, when its validity was questioned, as repugnant to the constitution of the United States, and the right of the party depended upon the state law.

LECTURE XVI.

OF THE JURISDICTION OF THE FEDERAL COURTS IN RESPECT TO THE COMMON LAW, AND IN RESPECT TO PARTIES.

(1.) It has been a subject of much discussion whether the courts of the United States have a common-law jurisdiction, and, if any, to what extent.

In the case of *The United States* v. *Worrall*, (*a*) in the Circuit Court at Philadelphia, the defendant was indicted and convicted of an attempt to bribe the commissioner of the revenue; and it was contended, on the motion in arrest of judgment, that the court had no jurisdiction of the case, because all the judicial authority of the federal courts was derived, either from the constitution, or the acts of Congress made in pursuance of it, and an attempt to bribe the commissioner of the revenue was not a violation of any constitutional or legislative prohibition. Whenever Congress shall think any provision by law necessary to carry into effect the constitutional powers of the government, it was said, they may establish it, and then a violation of its sanctions will come within the jurisdiction of the circuit courts, which have exclusive cognizance of all crimes and offences cognizable under the authority of the United States. Congress had provided by law for the punishment of various crimes, and even for the punishment of bribery itself, in the case of a judge, an officer of the customs, or an officer of the excise; but in
* 332 the case of the commissioner of the revenue, * the act of Congress did not create or declare the offence. The question then fairly and directly presented itself, what was there to render it an offence arising under the constitution or laws of the United States, and cognizable under their authority? A case arising under a law, must mean a case depending on the exposition of the law, in respect to something which the law prohibits or enjoins; and if it were sufficient, in order to vest a jurisdiction to try a crime or sustain an action, that a federal officer was con-

The U. S. courts have no common-law jurisdiction in criminal cases.

(*a*) 2 Dallas, 384.

cerned and affected by the act, a source of jurisdiction would be opened, which would destroy all the barriers between the judicial authorities of the states and the general government. Though an attempt to bribe a public officer be an offence at common law, the constitution of the United States contains no reference to a common-law authority. Every power in the constitution was matter of definite and positive grant, and the very powers that were granted could not take effect until they were exercised through the medium of a law. Though Congress had the power to make a law which would render it criminal to offer a bribe to the commissioner of the revenue, they had not done it, and the crime was not recognized either by the legislative or constitutional code of the Union.

In answer to this view of the subject, it was observed, that the offence was within the terms of the constitution, for it arose under the law of the United States, and was an attempt by bribery to obstruct or prevent the execution of the laws of the Union. If the commissioner of the revenue had accepted the bribe, he would have been indictable in the courts of the United States; and, upon principles of analogy, the offence of the person who attempted it must be equally cognizable in those courts. The prosecution against Henfield, for serving on board a French privateer against the Dutch, was the exercise of a common-law power, applied to an offence against the law of nations, and a breach of a treaty, which provided no specific penalty for such a case.

The court were divided in opinion on this question. In the opinion of the circuit judge, an indictment at common
* law could not be sustained in the Circuit Court. It was * 333
admitted, that Congress were authorized to define and punish the crime of bribery; but as the act charged as an offence in the indictment had not been declared by law to be criminal, the courts of the United States could not sustain a criminal prosecution for it. The United States, in their national capacity, have no common law, and their courts have not any common-law jurisdiction in criminal cases, and Congress have not provided by law for the offence contained in the indictment; and until they defined the offence, and prescribed the punishment, he thought the court had not jurisdiction of it.

The district judge was of a different opinion, and he held that the United States were constitutionally possessed of a common-law

power to punish misdemeanors, and the power might have been exercised by Congress in the form of a law, or it might be enforced in a course of judicial proceeding. The offence in question was one against the well-being of the United States, and from its very nature cognizable under their authority.

This case settled nothing, as the court were divided; but it contained some of the principal arguments on each side of this nice and interesting constitutional question.

In the case of *The United States* v. *Burr*, which arose in the Circuit Court of Virginia, in 1807, the chief justice of the United States declared, (*a*) that the laws of the several states could not be regarded as rules of decision in trials for offences against the United States, because no man could be condemned or prosecuted in the federal courts on a state law. The expression, *trials at common law*, used in the 34th section of the Judiciary Act, was not applicable to prosecutions for crimes. It applied to civil suits, as contradistinguished from criminal prosecutions, and to suits at common law, as contradistinguished from those which came be-

*334 fore *the court sitting as a court of equity and admiralty.

He admitted, however, that when the Judiciary Act, sec. 14, authorized the courts to issue writs not specially provided for by statute, but which were agreeable *to the principles and usages of law*, it referred to that generally recognized and long-established law, which formed the *substratum* of the laws of every state.

The case of *The United States* v. *Hudson & Goodwin*, (*a*) brought this great question in our national jurisprudence for the first time before the Supreme Court of the United States. The question there was, whether the Circuit Court of the United States had a common-law jurisdiction in cases of libel. The defendants had been indicted in the Circuit Court in Connecticut, for a libel on the President of the United States, and the court was divided on the point of jurisdiction. A majority of the Supreme Court decided, that the circuit courts could not exercise a common-law jurisdiction in criminal cases. (*b*) Of all the courts which the United

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(*a*) Opinion delivered September 3d, 1807, and reported by Mr. Ritchie.

(*a*) 7 Cranch, 32.

(*b*) S. P. *Infra*, p. 361; United States *v.* Bevans, p. 362; United States *v.* Wiltberger, also *infra*, p. 362; and United States *v.* Mackenzie & Gansevoort, District Court, New York, January 11th, 1843. In the states of Ohio and Louisiana, it is

States, under their general powers, might constitute, the Supreme Court was the only one that possessed jurisdiction derived immediately from the constitution. All other courts created by the general government possessed no jurisdiction but what was given them by the power that created them, and could be vested with none but what the power ceded to the general government would authorize them to confer; and the jurisdiction claimed in that case has not been conferred by any legislative act. When a court is created, and its operations confined to certain specific objects, it could not assume a more extended jurisdiction. Certain implied powers must necessarily result to the courts of justice from the nature of their institution, but jurisdiction of crimes against the state was not one of them. * To fine for contempt, to * 335 imprison for contumacy, to enforce the observance of orders, are powers necessary to the exercise of all other powers, and incident to the courts, without the authority of a statute. But to exercise criminal jurisdiction in common-law cases, was not within their implied powers, and it was necessary for Congress to make the act a crime, to affix a punishment to it, and to declare the court which should have jurisdiction.

The general question was afterwards brought into renewed discussion, in the Circuit Court of the United States for Massachusetts, in the case of *The United States* v. *Coolidge*. (*a*) Notwithstanding the decision in the case of *The United States* v. *Hudson & Goodwin*, the court in Massachusetts thought the question, in consequence of its vast importance, entitled to be reviewed and again discussed, especially as the case in the Supreme Court had been decided without argument, and by a majority only of the court. In this case, the defendant was indicted for an offence committed on the high seas, in forcibly rescuing a prize, which had been captured by an American cruiser. The simple question was, whether the Circuit Court had jurisdiction to punish offences against the United States, which had not been previously defined, and a specific punishment affixed by statute. The judge who presided in that court did not think it necessary to consider the broad question, whether the United States, as a sovereign power, had entirely adopted the common law. He admitted that the courts of

understood to be held, that there is no common-law indictable offence, and that every indictable offence must be grounded upon some statute.

(*a*) 1 Gallison, 488.

the United States were courts of limited jurisdiction, and could not exercise any authorities not confided to them by the constitution and laws made in pursuance of it. But he insisted that when an authority was once lawfully given, the nature and extent of that authority, and the mode in which it should be exercised, must be regulated by the rules of the common law, and that if this distinction was kept in sight, it would dissipate the whole difficulty and obscurity of the subject.

*336 * It was not to be doubted that the constitution and laws of the United States were made in reference to the existence of the common law, whatever doubts might be entertained as to the question, whether the common law of England, in its broadest sense, including equity and admiralty as well as legal doctrines, was the common law of the United States. In many cases, the language of the constitution and laws would be inexplicable without reference to the common law; and the existence of the common law is not only supposed by the constitution, but it is appealed to for the construction and interpretation of its powers.

It was competent for Congress to confide to the circuit courts jurisdiction of all offences against the United States; and they have given to it exclusive cognizance of most crimes and offences cognizable under the authority of the United States. The words of the 11th section of the Judiciary Act of 1789 were, that the circuit courts should have "exclusive cognizance of all the crimes and offences cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct." This means all crimes and offences to which, by the constitution of the United States, the judicial power extends, and the jurisdiction could not be given in more broad and comprehensive terms. To ascertain what are crimes and offences against the United States, recourse must be had to the principles of the common law, taken in connection with the constitution. (*a*) Thus, Congress had provided for the punishment of murder, manslaughter, and perjury, under certain circumstances, but had not defined those crimes. The ex-

*337 planation of them must be sought in and * exclusively gov-

(*a*) Judge Wilson, in his charge to a grand jury in the Circuit Court of the United States, in Virginia, in 1791, observed, that we must recur to the common law for the definition and description of many crimes against the United States. See Wilson's Works, vol. iii. pp. 371–377.

erned by the common law; and upon any other supposition, the judicial power of the United States would be left in its exercise to arbitrary discretion. In a great variety of cases, arising under the laws of the United States, the will of the legislature cannot be executed unless by the adoption of the common law. The interpretation and exercise of the vested jurisdiction of the courts of the United States, as, for instance, in suits in equity and in causes of admiralty and maritime jurisdiction, and in very many other cases, must, in the absence of positive law, be governed exclusively by the common law.

There are many crimes and offences, such as offences against the sovereignty, the public rights, the public justice, the public peace, and the public police of the United States, which are cognizable under its authority; and in the exercise of the jurisdiction of the United States over them, the principles of the common law must be applied, in the absence of statute regulations. Treason, conspiracies to commit treason, embezzlement of public records, bribery, resistance to judicial process, riots and misdemeanors on the high seas, frauds and obstructions of the public laws of trade, and robbery and embezzlement of the mail of the United States, are offences at common law, and when directed against the United States, they are offences against the United States, and, being offences, the circuit courts have cognizance of them, and can try and punish them upon the principles of the common law. The punishment must be fine and imprisonment, for it is a settled principle, that where an offence exists to which no specific punishment is affixed by statute, fine and imprisonment is the punishment. The common law is then to be referred to, not only as the rule of decision in criminal trials in the courts of the United States, but in the judgment or punishment; and by common law he meant the word in its largest sense, as including the whole system of English jurisprudence.

*It was accordingly concluded, that the circuit courts *338 had cognizance of all offences against the United States, and what those offences were, depended upon the common law applied to the powers confided to the United States, and that the circuit courts, having such cognizance, might punish by fine and imprisonment, where no punishment was specially provided by statute. The admiralty was a court of extensive criminal, as well as civil jurisdiction; and offences of admiralty jurisdic-

tion were exclusively cognizable by the United States, and were offences against the United States, and punishable by fine and imprisonment, where no other punishment was specially prescribed.

This case was brought up to the Supreme Court, but it was not argued. A difference of opinion still existed among the members of the court and, under the circumstances, the court merely said, that they did not choose to review their former decision in the case of *The United States* v. *Hudson & Goodwin*, or draw it in doubt. (*a*) The decision was for the defendant, and, consequently, against the claim to any common-law jurisdiction in criminal cases.[1]

These jarring opinions and decisions of the federal courts have not settled the general question as to the application and influence of the common law, upon clear and definite principles; and it may still be considered, in civil cases, as open for further consideration. The case of *Hudson & Goodwin* decided that the United States courts had no jurisdiction given them by the constitution or by statute, over libels; and the case of *Worrall* decided that they had no jurisdiction in the case of an attempt to bribe a commissioner of the revenue. If that were so, the common law certainly could not give them any. The cases were therefore very correctly decided upon the principle assumed by the court.

*339 But the subsequent case of *Coolidge* did not fall within that principle, because the offence there charged * was clearly a case of admiralty jurisdiction, and the courts of the United States would seem to have had general and exclusive jurisdiction over the case. Mr. Du Ponceau, in his "Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States," has ably examined the subject, and shed strong light on this intricate and perplexed branch of the national jurisprudence. He pursues the distinction originally taken in the Circuit Court in Massachusetts, and maintains, that we have not, under our federal government, any common law, considered as *a source of jurisdiction;* while, on the other hand, the common law, considered merely as the *means* or *instrument* of exercising the jurisdiction conferred by the constitution

(*a*) 1 Wheaton, 415.

[1] No indictment will lie against a bridge as a nuisance, on behalf of the United States; but a proceeding might be had at the instance of an individual in the federal or state courts. State of Pennsylvania *v.* Wheeling Co. 13 How. U. S. 519.

and laws of the Union, does exist, and forms a safe and beneficial system of national jurisprudence. The courts cannot derive their *right to act* from the common law. They must look for that right to the constitution and law of the United States. But when the general jurisdiction and authority is given, as in cases of admiralty and maritime jurisdiction, *the rules of action* under that jurisdiction, if not prescribed by statute, may and must be taken from the common law, when they are applicable, because they are necessary to give effect to the jurisdiction. (*a*)

The principle assumed by the courts in the cases of *Worrall* and of *Hudson & Goodwin*, is considered to be a safe and sound principle. The mere circumstance that the party injured by the offence under prosecution was an officer of the government of the United States does not give jurisdiction; for neither the constitution, nor the judicial acts founded upon it, gave the federal courts a general jurisdiction in criminal cases, affecting the officers of government, as they have in cases affecting public ministers and consuls. Because an officer was appointed under the constitution, * that would not *of itself* render * 340 all cases in which they were concerned, or might be affected, cases arising under the constitution and laws, and cognizable by the judiciary. Such a wide construction would be transferring legislative power to the judiciary, and vest it with almost unlimited jurisdiction; for where is the act that might not, in some distant manner, be connected with the constitution or laws of the United States? It rests alone in the discretion of Congress, to throw over the persons and character of the officers of the government, acting in their official stations, a higher protection than that afforded by the laws of the states; and when laws are made for that purpose, the federal courts will be charged with the duty of executing them.

This appears to be sound doctrine, and to be deduced from the cases which have been mentioned. There is much weight undoubtedly due to the argument of the Circuit Court of Massachusetts; and an attempt to bribe an officer of the government, or to libel an officer of the government, in relation to his official acts, would seem to be an offence against that government.

(*a*) *Cui jurisdictio data est, ea quoque concessa esse videntur, sine quibus jurisdictio explicari non potest.* Dig. 2, 1, 2.

They tend directly to weaken or pervert the administration of it; and if it once be admitted that such acts amount to an *offence against the United States*, they must of course be cognizable under its authority, and belong to the jurisdiction of the circuit courts. The great difficulty and the danger is, in leaving it to the courts to say *what is an offence against the United States*, when the law has not specifically defined it. The safer course undoubtedly is, to confine the jurisdiction in criminal cases to *statute* offences duly defined, and to cases within the *express* jurisdiction given by the constitution. The admiralty jurisdiction of the federal courts is derived expressly from the constitution; and criminal cases belonging to that jurisdiction by the common law, and by the law of nations, might well have been supposed to be cognizable in the admiralty courts, without any statute authority. If the common law be a rule of decision in the exercise of
*341 the *lawful jurisdiction of the federal courts, why ought it not to apply to criminal as well as to civil cases, and upon the same principle, when jurisdiction is clearly vested? If Congress should, by law, authorize the district or circuit courts to take cognizance of attempts to bribe an officer of the government in the exercise of his official trust, and should make no further provision, the courts would, of course, in the description, definition, and prosecution of the offence, be bound to follow those general principles and usages which are not repugnant to the constitution and laws of the United States, and which constitute the common law of the land, and form the basis of all American jurisprudence. Though the judiciary power of the United States cannot take cognizance of offences at common law, unless they have jurisdiction over the person or subject-matter given them by the constitution or laws made in pursuance of it; yet, when the jurisdiction is once granted, the common law, under the correction of the constitution and statute law of the United States, would seem to be a necessary and a safe guide, in all cases, civil and criminal, arising under the exercise of that jurisdiction, and not specially provided for by statute. Without such a guide, the courts would be left to a dangerous discretion, and to roam at large in the trackless field of their own imaginations. (*a*)

(*a*) *Military and naval crimes and offences*, committed while the party is attached to, and under the immediate authority of the army or navy of the United States, and in

The Supreme Court of the United States, in *Robinson* v. *Campbell*, (*b*) went far towards the admission of the existence and application of the common law to civil cases in the federal courts. The Judiciary Act of 1789 had de- Application of the common law to civil cases.

actual service, are not cognizable under the *common-law* jurisdiction of the courts of the United States. They are not included in the Judiciary Act of 24th September, 1789. They are cognizable in the military and naval courts-martial instituted under the acts of Congress. The circuit and district courts of the United States have no criminal jurisdiction but what is expressly conferred upon them by statute. United States *v.* Hudson, 7 Cranch, 32; United States *v.* Bevans, 3 Wheaton, 336; Washington J., in Houston *v.* Moore, 5 Wheaton, 29; Sergeant's Constitutional Law, 131, (1st edit.) *vide supra*, p. 334, and *infra*, pp. 362, 363, 364. It seemed, however, to be left as an unsettled question, in the case of The United States *v.* Mackenzie, *infra*, p. 363, note, whether the military and naval courts of the United States, and the courts of civil jurisdiction, had *concurrent* powers in questions of the above nature, under the acts of Congress. If they had, an acquittal by a court-martial would be a *bar* to any criminal proceeding in any other court, for no person is to be put in jeopardy twice for the same offence. The better opinion in that case would also be, that a prosecution, instituted and pending before a naval tribunal, would be a good plea in *abatement* of any prosecution subsequently instituted in a national civil court of criminal jurisdiction; for it would be unjust, absurd, and impracticable to have a trial for the same crime going on at the same time in two distinct co-ordinate tribunals, under the same government. The one that first takes cognizance of the case attaches to itself, of course, exclusive jurisdiction. See *infra*, vol. ii. 122–125. The sounder doctrine, however, is, that the act of Congress of April 23d, 1800, c. 33, creating a naval code of martial law for the trial of crimes and offences committed in the naval service, withdrew the cognizance of crimes in the naval service from courts of civil jurisdiction, and placed them *exclusively* in courts-martial, acting under a distinct and peculiar code, and which Lord Mansfield termed "a sea military code, which the wisdom of ages had formed." That act of Congress specified particular crimes cognizable by naval courts-martial, and also declared, that all crimes committed by persons belonging to the navy, and not therein specified, should be punished "according to the laws and customs in such cases at sea." The opinions of Lord Mansfield and Lord Loughborough, in Johnstone *v.* Sutton, 1 Term R. 548, contain principles which go far, by their masterly strength, to establish the necessity and justice of the exclusive jurisdiction of the military tribunals, in cases of crimes committed in the naval service; for it is in that service 'that commanders must act "upon delicate suspicions — upon the evidence of their own eye; — that they must give desperate commands; — that they must require instantaneous obedience; — and a military tribunal is capable of feeling all these circumstances." He further observes, that "where a man is charged with an offence against the articles, or where the articles are silent, against the usages of the navy, he can only be tried by a court-martial." The 4th section of the act of Congress of March 3d, 1825, c. 276, commonly called the Crimes Act, seems to be essentially a repetition of the 8th section of the act of Congress of April 30th, 1790, c. 36, and that provision did not apply to the navy of the United States, for it withheld that *express jurisdiction* to the courts of the United States which the cases already cited would seem to require. We would have expected some express jurisdiction

(*b*) 3 Wheaton, 212; 10 Ibid. 159, S. P.

clared (*c*) that the laws of the several states, except where the constitution, treaties, or statutes of the Union otherwise required, should be regarded as rules of decision *in trials* at common law in the courts of the United States, in cases where they applied. (*d*)[2] The subsequent act of May 8th, 1792, for regulating processes in the courts of the United States, (*e*) confirmed

given to the civil courts over crimes at sea in the United States navy, after the enactment of the naval code of 1800, and the specific provisions therein for the punishment of crimes committed in the navy, by naval courts-martial, if such had been the policy and intention of the law. Not only a sound construction of the statute law, but the discipline and efficiency of the naval military service, strongly sustain this conclusion. It is not a question susceptible of doubt, that Congress may, under the constitution, confer upon courts-martial in the army and navy the trial and punishment of crimes, capital and otherwise, for they are authorized "to make rules for the government and regulation of the land and naval forces"; and cases "arising in the land and naval forces" are excepted from the provision, that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury." *Military* law is a system of regulations for the government of the armies in the service of the United States, authorized by the act of Congress of April 10th, 1806, and known as the *articles of war*. And *naval* law is a similar system for the government of the navy, under the act of Congress of April 23d, 1800. But *martial* law is quite a distinct thing, and is founded on paramount necessity, and proclaimed by a military chief. In the case of Captain Mackenzie, above alluded to, the subject of jurisdiction was again brought before Judge Betts, holding the Circuit Court of the United States in New York, March 20th, 1843; (United States *v.* Mackenzie, 1 N. Y. Legal Observer, 371;) and, after a powerful discussion, he instructed and charged the grand jury, that the jurisdiction of the naval court-martial was exclusive, and that the civil tribunals had no jurisdiction in the case of Captain Mackenzie, then on trial in the harbor of New York, before a naval court-martial, on a charge of murder on the high seas, on board the United States sloop-of-war Somers, by hanging three of the crew for mutiny.[1]

(*c*) Act of 24th September, 1789, c. 20, sec. 34.

(*d*) This provision was inapplicable to the *practice* of the national courts, and only furnishes a rule to guide them in the formation of their judgments. In the case of Swift *v.* Tyson, Sup. Court, U. S. 16 Peters U. S. 1, it was decided, that the statute only extended to the statutes and permanent local usages of a state, and the construction thereof adopted by the local tribunals, and to rights and titles to real estates, and to other matters immovable and intra-territorial in their nature and character. It did not extend to contracts, or other instruments of a commercial nature.

(*e*) Ch. 36, sec. 2.

[1] Trespass may be maintained in the state courts against a naval officer for illegally assaulting and imprisoning one of his subordinates, though the act was done on the high seas, and under the color of naval discipline. Wilson *v.* Mackenzie, 7 Hill (N. Y.) 95.

[2] Suydam *v.* Williamson, 24 How. U. S. 427. But state laws and the decisions of state courts do not afford the rule of decision in cases where the question is, whether a contract is protected from state legislation by the constitution of the United States. Jefferson Branch Bk. *v.* Skelly, 1 Black U. S. 436.

*"the forms of writs, executions, and other processes, *342 except their style, and the forms and modes of proceeding then used in suits at common law in the federal courts, and declared that the modes of proceeding in suits in equity should be according to the principles and usages of courts of equity." But all these forms and modes were to be "subject to such alterations and additions as the said courts respectively should, in their discretion, deem expedient, or to such regulations as the Supreme Court of the United States should think proper from time to time to prescribe to any circuit or district court concerning the same." (a) Under those provisions, the court declared,

(a) The act of Congress of May 19th, 1828, c. 68, rendered the forms of mesne process, except the style and the forms and modes of proceeding in the federal courts in those states admitted into the Union since September 29th, 1789, conformable to the supreme courts of law and equity in those states; and declared that writs of execution and other final process in the federal courts should, except as to style, be the same in each state as were then (May, 1828) used in the courts of such states, and with power in the federal courts, in their discretion, to alter their final process so far as to conform it to the future changes in that process in the state courts. The practice of the supreme courts of the state *in use in September*, 1789, was adopted, subject to alterations, by the federal courts. 1 Paine C. C. 428, 429; Wayman *v.* Southard, 10 Wheaton, 1, 31, 32, 50; Bank of United States *v.* Halstead, 10 Wheaton, 51; 1 Peters C. C. 1; Beers *v.* Haughton, 9 Peters U. S. 329, 369–371. These modes and forms of proceedings remain unaffected by subsequent *state regulations* on the subject, for the act of Congress did not adopt prospectively such alterations as the states might afterwards make. Lane *v.* Townsend, Ware's Rep. 286. Springer *v.* Foster, 1 Story's R. 601. Such parts only of the laws of a state as are applicable to the courts of the United States are adopted by the Process Act of Congress. *A penalty is not adopted*, being one given against a sheriff in default. Gwin *v.* Breedlove, 2 How. U. S. 29. Mr. Justice Story doubted whether Congress possessed constitutional authority to adopt, *prospectively*, state legislation on any given subject. 3 Sumner, 369. When, therefore, the State of Tennessee, by act, in 1820, allowed lands sold on execution to be redeemed on certain terms, it was held that lands thereafter sold on execution under federal process, were not redeemable under the provisions of the statute, for state legislation cannot interfere with the process of the federal courts. Polk *v.* Douglass, 6 Yerger, 209; Ross *v.* Duval, 13 Peters U. S. 45, S. P. The federal courts follow the decisions of the state courts on the construction of state laws, unless they come in conflict with the constitution or laws of the United States. 10 Wheaton, 159. 1 Paine C. C. 564. They follow, also, those statutes of the several states which prescribe rules of evidence in civil cases, in trials at common law. M'Neil *v.* Holbrook, 12 Peters U. S. 94. The state laws which are made rules of decision in the federal courts, are those which apply to *rights* of person and property. United States *v.* Wonson, 1 Gallison, 18. Mayer *v.* Foulkrod, 4 Wash. C. C. 349. See, also, *infra*, vol. iv. 278, note. State laws *limiting* actions and executions on judgments are rules of property, and become rules of decision in the federal courts. Ross *v.* Duval, 13 Peters U. S. 45. By act of Congress of August 23, 1842, c. 188, the Supreme Court has power to prescribe, regulate, and alter the forms of process in the District and Circuit Courts, the forms of pleading in

in the case last referred to, that the remedies in the federal courts, at common law and in equity, were to be, not according to the practice of state courts, "but according to the principles of common law and equity, as distinguished and defined in that country, from which we derived our knowledge of those principles." (*b*)

In this view of the subject, the common law may be cultivated as part of the jurisprudence of the United States. In its improved condition in England, and especially in its improved and varied condition in this country, under the benign influence of an expanded commerce, of enlightened justice, of republican principles, and of sound philosophy, the common law has become a code of matured ethics and enlarged civil wisdom, admirably adapted to promote and secure the freedom and happiness of social life. It has proved to be a system replete with vigorous and healthy principles, eminently conducive to the growth of civil liberty; and it is in no instance disgraced by such a slavish political maxim as that with which the Institutes of Justinian are introduced. (*c*)

* 343 It is the common jurisprudence of the United States, and was brought with them as * colonists from England, and established here, *so far* as it was adapted to our institu-

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suits at common law, or in admiralty, or in equity, and of taking testimony and of entering decrees, and generally to regulate the whole practice of the courts. The *rules of practice* in admiralty cases, on the instance side of the District Court, were established in pursuance of the act of 23d August, 1842, c. 188. See those rules in 3 N. Y. Legal Observer, 357. With respect to the common law as a part of federal jurisprudence, the Supreme Court declared, in Wheaton *v.* Donaldson, 8 Peters U. S. 658, that there could not be a common law of the United States. Each of the states has its local usages, customs, and common law. There was no principle which pervades the Union, and has the authority of law, that is not embodied in the constitution and laws of the Union. The common law could be made a part of our federal system only by legislative adoption, and when a common-law right is asserted, the courts look to the state in which the controversy originated.

(*b*) Though there be no equity state courts, that does not prevent the exercise of equity jurisdiction in the courts of the United States; they adopt and follow the equity jurisprudence existing in England. The District Court of Louisiana has accordingly equity powers, and it is bound to proceed in equity causes according to the principles, rules, and usages which belong to the courts of equity, as contradistinguished from courts of common law. Gaines *v.* Relf, 15 Peters U. S. 9; Lorman *v.* Clarke, 2 McLean, 568, 571.[1]

(*c*) *Quod principi placuit, legis habet vigorem.* Inst. 1, 2, 6.

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[1] Neves *v.* Scott, 13 How. U. S. 268; State of Pennsylvania *v.* Wheeling Bridge Co. 13 How. U. S. 519; Bennett *v.* Butterworth, 11 How. U. S. 669.

tions and circumstances. It was claimed by the Congress of the United Colonies, in 1774, as a branch of those "indubitable rights and liberties to which the respective colonies are entitled." (*a*) It fills up every interstice, and occupies every wide space which the statute law cannot occupy. Its principles may be compared to the influence of the liberal arts and sciences; *adversis perfugium ac solatium præbent; delectant domi, non impediunt foris; pernoctant nobiscum, peregrinantur, rusticantur.* To use the words of the learned jurist, to whom I have already alluded, (*b*) "we live in the midst of the common law, we inhale it at every breath, imbibe it at every pore; we meet with it when we wake and when we lay down to sleep, when we travel and when we stay at home; and it is interwoven with the very idiom that we speak; and we cannot learn another system of laws without learning, at the same time, another language." [1]

2. The jurisdiction of the federal courts *ratione personarum*, and depending on the relative character of the litigant parties, has been the subject of much judicial discussion. The constitution gives jurisdiction to the federal courts of all suits between aliens and citizens, and between resident citizens of different states, (*c*) and we have a series of judicial decisions on that subject. If the case arises under the constitution, laws, or treaties of the Union, it is immaterial who may be parties, for the subject-matter gives jurisdiction; and if it arises between aliens and citizens, or between citizens of different states, it is immaterial what may be the nature of the controversy, for the character of the parties gives jurisdiction.

(*a*) Declaration of Rights of October 14th, 1774; Journals of Congress, vol. i. p. 28.

(*b*) Du Ponceau on Jurisdiction, p. 91. See, also, 1 Story's Comm. on the Constitution, 140, 141; vol. ii. pp. 264–268. The learned commentator, in the volume last cited, ably, and, in my opinion, satisfactorily contends that the common law, in the absence of positive statute law, regulates, interprets, and controls the powers and duties of the Court of Impeachments under the constitution of the United States; and though the common law cannot be the foundation of a jurisdiction not given by the constitution and laws, that jurisdiction, when given, attaches, and is to be exercised according to the rules of the common law. Were it otherwise, there would be nothing to exempt us from an absolute despotism of opinion and practice.

(*c*) Lessee of Butler *v.* Farnsworth, 4 Wash. C. C. 101.

[1] The United States courts are courts of special jurisdiction, and derive all their powers from the constitution and the laws of Congress. But in the construction of the acts of Congress, the rules and principles of the common law are the true guide.

Jurisdiction when an alien is a party.

In *Bingham* v. *Cabot*, (*d*) the Supreme Court held, that it was necessary to set forth the citizenship of the re- * 344 spective * parties, or the alienage, when a foreigner was concerned, by positive averments, in order to bring the case within the jurisdiction of the Circuit Court; and that if there was not a sufficient allegation for that purpose on record, no jurisdiction of the suit would be sustained. The same doctrine was maintained in *Turner* v. *Enrille*, (*a*) and in *Turner* v. *The Bank of North America;* (*b*) and it was declared, that the Circuit Court was a court of limited jurisdiction, and had cognizance only of a few cases specially circumstanced, and that the fair presumption was, that a cause was without its jurisdiction till the contrary appeared. Upon that principle the rule was founded, making it necessary to set forth, upon the record of the Circuit Court, the facts or circumstances which gave jurisdiction, either expressly or in such manner as to render them certain by legal intendment. It is necessary, therefore, where the defendant appears to be a citizen of one state, to show, by averment, that the plaintiff is a citizen of some other state, or an alien; or, if the suit be upon a promissory note, by the indorsee, to show that the original payee was so; for it is his description, as well as that of the indorsee, which gives the jurisdiction.[1] But an alien cannot sue a citizen in the Circuit Court of the United States, if the latter be at the time a resident in a foreign country, notwithstanding he has property in the district which might be attached. No compulsory process, under the Judiciary Act of 1789, lies against a person who is not at the time an inhabitant of, or is not found in the district in which the process issues. This goes to exclude from the federal courts the proceeding by foreign attachment under the local laws of the states. (*c*)

Between citizens of different states.

The Judiciary Act of 1789, sec. 11, gives jurisdiction to the Circuit Court when an alien is a party; and it was decided in *Mossman* v. *Higginson*, (*d*) that the jurisdiction was confined to the case of suits between citizens and foreigners, and did not extend to suits between alien and alien; and

(*d*) 3 Dallas, 382.
(*a*) 4 Dallas, 7.
(*b*) 4 Dallas, 8.
(*c*) Picquet *v.* Swan, 5 Mason 35; Toland *v.* Sprague, 12 Peters U. S. 300.
(*d*) 4 Dallas, 12.

[1] Judiciary Act of 1789, sec. 11.

* that if it appeared on record that the one party was an * 345
alien, it must likewise appear affirmatively that the other party was a citizen. So, again, in *Course* v. *Stead*, (*a*) it was decided to the same effect. The principle is, that it must appear upon the record, that the character of the parties supports the jurisdiction; and the points in that case were reasserted in *Montalet* v. *Murray*, (*b*) and in *Hodgson* v. *Bowerbank*, (*c*) and in *Sullivan* v. *The Fulton Steamboat Company*. (*d*) In *Maxfield* v. *Levy*, (*e*) the question of jurisdiction, arising from the character of the parties, was discussed in the Circuit Court of Pennsylvania, and the court animadverted severely upon an attempt to create a jurisdiction by fraud, contrary to the policy of the constitution and the law. The suit was an ejectment between citizens of the same state, to try title to land; and, to give jurisdiction to the Circuit Court, a deed was given, collusively, and without any consideration, to a citizen of another state, for the sole purpose of making him a nominal plaintiff, in order to give the federal court jurisdiction. The court dismissed the suit, and observed, that the constitution and laws of the United States had been anxious to define, by precise boundaries, and preserve with great caution, the line between the judicial authority of the Union and that of the individual states. No contrivance to defeat the law of the land, and create jurisdiction by fraud, could be tolerated. (*f*) But if a citizen of one state thinks proper to change his domicil, and remove with his family to another state, not colorably, but permanently, and with a *bona fide* intention to *reside* there, * even though * 346
his object was to avail himself of the jurisdiction of the

(*a*) 4 Dallas, 22. The omission of the above averments, or any other requisite to give jurisdiction, is matter of substance, and not cured by verdict, nor amendable after verdict. 1 Paine C. C. 486, 594. Jackson *v.* Twentyman, 2 Peters U. S. 136.

(*b*) 4 Cranch, 46.

(*c*) 5 Cranch, 303.

(*d*) 6 Wheaton, 450; Dodge *v.* Perkins, 4 Mason, 435, S. P.

(*e*) 4 Dallas, 330. This case was repudiated by Mr. Justice Story, in Briggs *v.* French, 2 Sumner, 257, as being erroneously decided.

(*f*) The same doctrine was held by Judge Washington, in Hurst *v.* McNeil, 1 Wash. C. C. 70, 83; Starling *v.* Hawks, 5 McLean, 318. But in Briggs *v.* French, 2 Sumner, 251, it was pointedly condemned; and the Judge held, that a conveyance of land by a citizen of one state to a citizen of another, for the purpose of enabling the latter to maintain a suit on it in the courts of the United States, vested a legal title, and a stranger not claiming under either of the parties had no right to inquire into the motive of the conveyance.

federal courts, he becomes instantly a citizen of the other state, and may sue as such in the courts of the United States. (*a*) [1]

The doctrine in the original case of *Bingham* v. *Cabot* was again confirmed in *Abercrombie* v. *Dupuis*, (*b*) with some symptoms of reluctance; and it would seem that the court was not entirely satisfied with the precise limits in which their jurisdiction had been circumscribed and embarrassed by their predecessors. But in *Strawbridge* v. *Curtiss*, (*c*) the limitation of the federal jurisdiction was considered as being still more close and precise. The Supreme Court declared, that where the interest was joint, and two or more persons were concerned in that interest, as joint plaintiffs, or joint defendants, each of them must be competent to sue, or liable to be sued, in the federal courts; and the suit was dismissed in that case, because some of the plaintiffs and defendants were citizens of the same state. (*d*) The next case that

(*a*) Lessee of Cooper *v.* Galbraith, 3 Wash. C. C. 546; Case *v.* Clark, 5 Mason, 70; Catlett *v.* Pacific Ins. Co. 1 Paine C. C. 594; Jones *v.* League, 18 How. U. S. 77. In Briggs *v.* French, 2 Sumner, 251, it was held, that it was sufficient to give jurisdiction to the federal courts, that a citizen of one state had really, and not merely nominally, removed from one state to another, though his motive might have been to prosecute a suit in the courts of the United States. It was sufficient if the plaintiff was *in fact* a citizen of one state and the defendant of another. The motive of the removal was not to be inquired into.

(*b*) 1 Cranch, 343.

(*c*) 3 Cranch, 267.

(*d*) But the Circuit Court of the United States is not deprived of its jurisdiction arising from the character of the party, by joining with an alien or citizen of another state *a mere nominal party*, who does not possess the requisite character. 5 Cranch, 303; 8 Wheaton, 451; 1 Paine C. C. 410. It has likewise been adjudged, that as the courts of Louisiana do not proceed according to the rules of the common law, but of the civil law, a suit may be brought in the federal courts by a resident alien against one or two obligors, bound severally as well as jointly, who reside in Louisiana, *though the other obligor resides in another state.* The rule in chancery and in the civil law is, that if the court can make a decree according to justice and equity between the parties before them, that decree shall not be withheld because a party out of its jurisdiction is not made a defendant, although he must have been united in the suit had he been within the reach of the process of the court. This was the principle of that decision. Breedlove *v.* Nicolet, 7 Peters U. S. 413. See, also, Harrison *v.* Urann, 1 Story C. C. 64. And now, by act of Congress of February 28th, 1839, c. 36, if there be several defendants, and any one or more of them is not an inhabitant of, or not found in the district where the suit is brought, and does not voluntarily appear, the court may entertain jurisdiction, and proceed against the parties properly before it.

[1] To effect a change of domicil, the intention and the completed act must concur. While in transit the former domicil continues. Graham *v.* Public Admr. 4 Brad. (N. Y.) 127.

arose on this subject was, whether a corporation was a citizen within the meaning of the constitution, and could sue in the federal courts in consequence of its legal character; and it was decided, in the cases of *The Hope Insurance Company* v. *Boardman*, and of *The Bank of the United States* v. *Deveaux*, (*e*) that a corporation aggregate was not, in its corporate capacity, a citizen, and that its right to litigate in the federal courts depended upon the character of * the individuals who compose the * 347 body politic, and which character must appear by proper averments upon the record. (*a*)[1] But a corporation aggregate, composed of citizens of one state, may sue a citizen of another state in the Circuit Court of the United States. If any of the stockholders are citizens of the same state with the defendant, the federal courts have no jurisdiction. And the rule relative to suits originally instituted in the courts of the United States, requiring all the individuals composing the respective parties to possess the requisite character to give the court jurisdiction, applies equally to suits removed from the state courts. (*b*)

(*e*) 5 Cranch, 57, 61; Bank of Augusta *v.* Earle, 13 Peters U. S. 519; Wood *v.* Hartford Fire Insurance Co. 13 Conn. 202, S. P.

(*a*) In Breithaupt *v.* The Bank of Georgia, 1 Peters U. S. 238, it was there held, that a bill, to give jurisdiction, must state that the stockholders were citizens of Georgia.

(*b*) Ward *v.* Arredondo, 1 Paine C. C. 410; Bank of Cumberland *v.* Willis, 3 Sumner, 472. But the very inconvenient and narrow doctrine contained in the cases of Strawbridge *v.* Curtiss, 3 Cranch, 367; Bank of the United States *v.* Deveaux, 5 Cranch, 84, and Comm. and R. R. Bank of Vicksburg *v.* Slocomb, 14 Peters U. S. 60, was reviewed and overruled in the Louisville Railroad Comp. *v.* Letson, in 2 How. U. S. 497. It was there held, that a *corporation* created and doing business in a state was an *inhabitant* of the state, capable of being treated as a *citizen*, for all purposes of suing and being sued, although some of the members of the corporation were not citizens of the state in which the suit was brought, and although the state itself might be a member of the corporation. This was a very important and salutary decision, and reinstated the federal courts in their essential jurisdiction in cases of suits between citizens of different states. The act of Congress of the 28th February, 1839, gave aid to this decision, it being considered in its language and construction, as an enlargement of jurisdiction in respect to the character of the parties.

[1] The rule laid down in the text seems to have been virtually changed by the more recent decisions. These cases, without maintaining that a corporation is a citizen for the purpose of jurisdiction, yet hold that a suit in the federal courts by or against a corporation in its corporate name, must be presumed to be a suit by or against citizens of the state which created the corporate body, and that no averment or evidence to the contrary can be admitted for the purpose of ousting the jurisdiction. Ohio and Miss. R. R. Co. *v.* Wheeler, 1 Black U. S. 286. See also 20 How. U. S. 232; 16 How. U. S. 314.

With respect to the question on the peculiar right of the Bank of the United States to sue in the federal courts, it was decided, in reference to the first bank of the United States, that no right was conferred on that bank by its act of incorporation to sue in those courts. It had only the ordinary corporate capacity to sue and be sued; and being an invisible, artificial being, a mere legal entity, and not a citizen, its right to sue must depend upon the character of the individuals of which it is composed. The constitution of the United States supposed apprehensions might exist, that the tribunals of the states would not administer justice as impartially as those of the nation, to parties of every description, and, therefore, it established national tribunals for the decision of controversies between aliens and citizens, and between citizens of different states. The persons whom a corporation represents may be aliens or citizens, and the controversy is between persons suing by their corporate name for a corporate right, and the individual defendant. Where the members of the corporation are aliens or citizens of a different state from the opposite party, they
*348 come *within the reason and terms of the jurisdiction of the federal courts. The court can look beyond the corporate name, and notice the character of these members, who are not considered, to every intent, as placed out of view, and merged in the corporation. Incorporated aliens may sue a citizen, or the incorporated citizens of one state may sue a citizen of another state, in the federal courts, by their corporate name, and the controversy is substantially between aliens and a citizen, or between the citizens of one state and those of another. In that case, the president, directors, and company of the Bank of the United States averred, that they were citizens of Pennsylvania, and that the defendants were citizens of Georgia; and this averment, nor traversed or denied, was sufficient to sustain the suit in the Circuit Court. In suits by the Bank of the United States, of 1816, such an averment is not necessary, because the act incorporating the bank (*a*) authorizes it to sue and be sued in the Circuit Court of the United States, as well as in the state courts. Without such an express provision, it would have been difficult for the Bank of the United States ever to have sued in the federal courts, if the fact of citizenship of all the members was to be scrutinized, for there were probably few or no states which had not some stock-

(*a*) Act of Congress, April 10, 1816, sec. 7.

holder of the bank a resident citizen. (*b*) It was indispensable for Congress to provide specially for a jurisdiction over suits in which the bank was concerned, or no jurisdiction could well have been sustained. It was truly observed, by the Supreme Court, that if the Bank of the United States could not sue a person who was a citizen of the same state with any one of its members, in the circuit courts, this disability would defeat the power.

A trustee, who holds the legal interest, is competent to * sue in right of his own character as a citizen or alien, * 349 as the case may be, in the federal courts, and without reference to the character or domicil of his *cestui que trust*, unless he was created trustee for the fraudulent purpose of giving jurisdiction. (*a*) This rule equally applies to executors and administrators, who are considered as the real parties in interest; but it does not apply to the case of a general assignee of an insolvent debtor, and he cannot sue in the federal courts, if his assignor could not have sued there. The 11th section of the Judiciary Act will not permit jurisdiction to vest by the assignment of a *chose in action*, (cases of foreign bills of exchange excepted,) unless the original holder was entitled to sue; and whether the assignment was made by the act of the party, or by operations of law, makes no difference in the case. An executor or administrator is not an assignee, within the meaning of the 11th section of the Judiciary Act. (*b*)[2]

(*b*) Osborn *v.* United States Bank, 9 Wheaton, 738; United States Bank *v.* Planters' Bank, 9 Wheaton, 904.

(*a*) Chappedelaine *v.* Dechenaux, 4 Cranch, 306, 308; Brown *v.* Strode, 5 Cranch, 303. See, also, 5 Cranch, 91, and Childress *v.* Emory, 8 Wheaton, 642. If the nominal plaintiff and the real defendant be citizens of the state, yet if the party for whose use the suit was brought was a citizen of another state, the Circuit Court of the United States has jurisdiction. Browne *v.* Strode, *sup.*; McNutt *v.* Bland, 2 How. U. S. 9.

(*b*) Sere *v.* Pitot, 6 Cranch, 332; Mayer *v.* Foulkrod, 4 Wash. C. C. 349. But it is adjudged that a note payable to A, or bearer, may be sued in the federal courts, in his own name, and that the 11th section of the Judiciary Act does not apply. Bullard *v.* Bell, 1 Mason, 243; Halsted *v.* Lyon, 2 McLean, 226. So the holder of a negotiable note, payable to the maker's own order, and indorsed, may sue the maker in the federal courts, though the holder be a citizen of another state; for the right passes not by *assignment*, but to bearer by delivery. Towne *v.* Smith, U. S. C. C. Mass. Law Reporter for May, 1846.[1]

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[1] See Coffee *v.* Planters' Bank of Tennessee, 13 How. U. S. 183.

[2] The equitable assignee of a claim to an account is within the restriction, if his assignor was not competent to sue on the ground of citizenship. Wilkinson *v.* Wilkinson, 2 Curtis C. C. 582.

With respect to the District of Columbia, and to the territorial districts of the United States, they are not *states*, within the sense of the constitution and of the Judiciary Act, so as to enable a citizen thereof to sue a citizen of one of the states in the federal courts. However extraordinary it might seem to be, that the courts of the United States, which were open to aliens, and to the citizens of every state, should be closed upon the inhabitants of those districts, on the construction that they were not citizens of a *state*, yet, as the court observed, this was a subject for legislative, and not for judicial consideration. (*c*)

350 * * If the jurisdiction of the Circuit Court between citizens of different states has once vested, it is not devested by a subsequent change of domicil of one of the parties, and his removal into the same state with the adverse party, *pendente lite*. (*a*) The jurisdiction depends upon the state of things at the time the action is brought.[1] So, an indorsee of a note, who resides in one state, may sue his immediate indorser, who resides in another state, though that immediate indorser and the maker be residents of the same state. The indorsement is a new contract between the parties to the record, quite distinct from the original note. (*b*)

Jurisdiction where a state is interested, and not a party on record.

The case of *Osborn* v. *The Bank of the United States*, (*c*) brought into view important principles touching the constitutional jurisdiction of the federal courts, where a state claimed to be essentially a party. The court decided, that the circuit courts had lawful jurisdiction, under the act of Congress incorporating the national bank, of a bill in equity brought by the bank for the purpose of protecting it in the exercise of its franchises, which were threatened to be invaded under a law of the state of Ohio; and that as the state itself could not be

(*c*) The term *state*, in the sense of the Constitution, applies only to the members of the American confederacy, and does not extend to a *territory* of the United States. Seton *v.* Hanham, R. M. Charlton (Geo.) 374; Hepburn *v.* Ellzey, 2 Cranch, 445; Corporation of New Orleans *v.* Winter, 1 Wheaton, 91.

(*a*) Morgan *v.* Morgan, 2 Wheaton, 290; Clarke *v.* Matthewson, 12 Peters U. S. 164.

(*b*) Young *v.* Bryan, 6 Wheaton, 146; Mollan *v.* Torrance, 9 Wheaton, 537.

(*c*) 9 Wheaton, 738.

[1] Therefore the appointment of a person as consul of a foreign power does not work an abatement of a suit already commenced. Koppel *v.* Heinrichs, 1 Barb. (N. Y.) 449.

made a party defendant, the suit might be maintained against the officers and agents of the state who were intrusted with the execution of such laws.

As the amendment to the constitution prohibited a state to be made a party defendant by individuals of other states, the court felt the pressure and difficulty of the objection, that the state of Ohio was substantially a party defendant, inasmuch as the process of the court in the suit acted directly upon the state, by restraining its officers from executing the law of the state. The direct interest of the state in the suit was admitted, but the objection, if it were valid, would go, in its consequences, completely to destroy the powers of *the Union. If the federal courts *351 had no jurisdiction, then the agents of a state, under an unconstitutional law of the state, might arrest the execution of any law of the United States. A state might impose a fine or penalty on any person employed in the execution of any law of the Union, and levy it, by a ministerial officer, without the sanction even of its own courts. All the various public officers of the United States, such as the carrier of the mail, the collector of the revenue, and the marshal of the district, might be inhibited, under ruinous penalties, from the performance of their respective duties. And if the courts of the United States cannot rightfully protect the agents who execute every law authorized by the constitution, from the direct action of state agents in the collection of penalties, they could not rightfully protect those who execute any law. The court insisted, that there was no such deplorable failure of jurisdiction, and that the federal judiciary might rightfully protect those employed in carrying into execution the laws of the Union from the attempts of a particular state, by its agents, to resist the execution of those laws. It may use preventive proceedings, by injunction or otherwise, against the agents or officers of the state, and authorize proceedings against the very property seized by the agent; and the court concluded, that a suit brought against individuals for any cause whatever, was not a suit *against a state*, in the sense of the constitution. The constitution contemplated a distinction between cases in which a state was interested, and those in which it was a party; and to be a party for the purpose of jurisdiction, it is necessary to be one upon record. The constitution only intended a party on record, and to be shown in the first instance by the simple inspection of the record, and that is

what is intended in all cases where jurisdiction depends upon the party. (*a*)

The question of jurisdiction depending upon the character and residence of parties, came again into discussion in the case
* 352 of *The Bank of the United States* v. *The Planters'* * *Bank of Georgia;* (*a*) and it was decided that the circuit courts had jurisdiction of suits brought by the Bank of the United States against a state bank, notwithstanding the state itself was a stockholder, together with private individuals who were citizens of the same state with some of the stockholders of the Bank of the United States. It was declared, that the state of Georgia was not, as a state, to be deemed a party defendant, though interested as a stockholder in the defence. The state, so far as concerned that transaction, was divested of its sovereign character, and took that of a private citizen; and this principle applies to every case in which the government becomes a partner in any trading company. (*b*)

We have seen how far the courts of the United States have a common-law jurisdiction; and it appears to have been wholly disclaimed in criminal cases; and the true distinction would seem to be, that all federal jurisdiction in civil and criminal cases must be derived from the constitution and the laws made in pursuance of it; and that when the jurisdiction is vested, the principles of the common law are necessary to the due exercise of that jurisdiction. We have seen, likewise, with what caution, and within what precise limits, the federal courts have exercised jurisdiction, in controversies between citizens and aliens, and between citizens of different states. In the next lecture we shall enter upon a particular examination of the powers and claims of the federal courts, relative to admiralty and maritime jurisdiction.

(*a*) In the case of McNutt *v.* Bland, 2 How. U. S. 9, it was decided, that a citizen of another state might sue a citizen of Mississippi, in the Circuit Court of the United States, though he sued in the name of the nominal plaintiff or trustee, who was also a citizen of Mississippi, *provided he was the party in interest.* Mr. Justice Daniel dissented, and contended, on the authority of prior decisions, that the jurisdiction depended, not on the situation of the parties concerned in interest, but on the character of the parties appearing on the record.

(*a*) 9 Wheaton, 904; Bank of Kentucky *v.* Wister, 2 Peters U. S. 318, S. P. In this last case it was decided that an incorporated bank was suable, though the whole property and control of the bank belonged to the state incorporating it.

(*b*) Story J., 11 Peters U. S. 349.

LECTURE XVII.

OF THE DISTRICT AND TERRITORIAL COURTS OF THE UNITED STATES.

THE District Courts act as courts of common law, and also as courts of admiralty.

Admiralty jurisdiction of the district courts.

A distinction is made in England between *the instance* and *the prize court* of admiralty. The former is the ordinary admiralty court, but the latter is a special and extraordinary jurisdiction; and although it be exercised by the same person, it is in no way connected with the former, either in its origin, its mode of proceeding, or the principles which govern it. To constitute the prize court, or to call it into action in time of war, a special commission issues, and the court proceeds summarily, and is governed by general principles of policy and the law of nations. This was the doctrine of the English Court of King's Bench, as declared by Lord Mansfield in *Lindo* v. *Rodney*; (*a*) and though some parts of his learned and elaborate opinion in that case do not appear to be very clear and precise on the point concerning the difference in the foundation of the powers of the instance and of the prize court of admiralty, yet I should infer from it that the judge of the English admiralty requires a special commission, distinct from his ordinary commission, to enable him, in time of war, to assume the jurisdiction of prize. The practice continues to this day of issuing a special commission, on the breaking out of hostilities, to the commissioners for executing the office of lord high admiral, giving them jurisdiction in prize cases. (*b*)

* The division of the court of admiralty into two courts is said not to have been generally known to the common lawyers of England before the case of *Lindo* v. *Rodney*; and yet it appears, from the research made in that case, that the prize jurisdiction was established from the earliest periods of the English judicial history. The instance court is the ordinary and appropriate court of admiralty, and takes cognizance of the general subjects of admiralty jurisdiction, and it proceeds according to the * 354

(*a*) Doug. 613, note.

(*b*) Ex parte Lynch, 1 Mad. Ch. 15.

civil and maritime law. The prize court has exclusive cognizance of matters of prize and matters incidental thereto, and it proceeds to hear and determine according to the course of the admiralty and the law of nations. The distinction between these two courts, or rather between these two departments of the same court, is kept up throughout all the proceedings; and the appeals from the decrees of these two jurisdictions are distinct, and made to separate tribunals. The appeal from the instance court lies to delegates, but from the prize courts it lies to the lords commissioners of appeals in prize causes, and who are appointed for that special purpose.

Such is the distinction in England between the instance and the prize court of admiralty; and in the case of *Ex parte Lynch*, (*a*) it was held, that the jurisdiction of the admiralty as a prize court did not cease with the war, but extended to all the incidents of prize, and to an indefinite period after the war. It remains to see how far that distinction is known or preserved in the jurisdiction of our district courts.

It is said by a judge, who must have been well acquainted with the subject, (for he was registrar of a colonial court of admiralty before our Revolution,) that this distinction between the instance and the prize court was not known to our admiralty pro-
* 355 ceedings under the * colony administrations. (*a*) In the case of *Jennings* v. *Carson*, (*b*) the District Court of Pennsylvania, in 1792, decided that prize jurisdiction was involved in the general delegation of admiralty and maritime powers, and that Congress, by the Judiciary Act of 1789, meant to convey to the district courts all the powers appertaining to admiralty and maritime jurisdiction, including that of prize. Prize jurisdiction was inherent in a court of admiralty, though it was of course a dormant power until called into activity by the occurrence of war.

District courts are equally instance and prize courts.

But notwithstanding this early decision in favor of the plenary jurisdiction of the district courts as courts of admiralty, there was great doubt entertained in this country, about the year 1793, whether the district courts had jurisdiction under the act of Congress of 1789, as prize courts. The District Court of Maryland decided against the jurisdiction, and that decree was affirmed on appeal to the Circuit Court, on the ground that a prize cause was not a civil cause of admiralty

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(*a*) 1 Mad. Ch. 15. (*a*) 1 Peters Adm. 5, 6. (*b*) 1 Ibid. 1.

jurisdiction, but rested on the *jus belli*, and that there was no prize court in existence in the United States. The same question was carried up to the Supreme Court of the United States in February, 1794, in the case of *Glass* v. *The Sloop Betsey*, (*c*) and was ably discussed. The Supreme Court put an end at once to all these difficulties about jurisdiction, by declaring that the district courts of the United States possessed all the powers of courts of admiralty, whether considered as instance or as prize courts.

In the case of *The Emulous*, (*d*) the Circuit Court in Massachusetts was inclined to think that the admiralty, from time immemorial, had an inherent jurisdiction in prize, because, if we examine the most venerable relics of ancient maritime jurisprudence, we shall find the admiralty in possession of prize jurisdiction, independent of any known special commission. It seems to have always constituted an ordinary, and not an extraordinary branch of the admiralty powers; * and it is to be observed, that *356 Lord Mansfield leaves the point uncertain, whether the prize and the instance jurisdiction were coeval in antiquity, or whether the former was constituted by special commission. Be that as it may, the equal jurisdiction of the admiralty in this country, as an instance and as a prize court, is now definitely settled; and if the prize branch of the jurisdiction of the admiralty be not known in time of peace, it is merely because its powers lie dormant, from the want of business to call them into action.

There is no pretence of claim, on the part of courts of common law, to any share in the prize jurisdiction of the courts of admiralty. It is necessarily and completely exclusive; and we will first take a view of the jurisdiction and powers of the district courts in prize cases, and then of their ordinary admiralty jurisdiction. As prize questions are applicable to a state of war, and are governed chiefly by the rules of the law of nations, and the usages and practices of the maritime powers, I do not propose to enlarge on that subject. My object will be to ascertain the exact jurisdiction of the District Court, in all its various powers and complicated character. I shall consider, (1.) its character as a prize court; (2.) as a court of criminal jurisdiction in admiralty; (3.) the division line between the admiralty and the courts of common law;

(*c*) 3 Dallas, 6; Penhallow *v.* Doane, 3 Dallas, 54, S. P. See, also, the act of Congress of June 26th, 1812, sec. 6.

(*d*) 1 Gallison, 563.

(4.) its powers as an instance court of admiralty; (5.) its jurisdiction as a court of common law, and clothed, also, with special powers.

Prize courts.

(1.) *Jurisdiction of the prize courts.*

The ordinary prize jurisdiction of the admiralty extends to all captures in war made on the high seas. I know of no other definition of prize goods, said Sir William Scott, in the case
* 357 of *The Two Friends*, (*a*) than that they are goods * taken on the high seas, *jure belli*, out of the hands of the enemy. The prize jurisdiction also extends to captures in foreign ports and harbors, and to captures made on land by naval forces, and upon surrenders to naval forces, either solely, or by joint operation with land forces. (*a*) It extends to captures made in rivers, ports, and harbors of the captor's own country. But as to plunder or booty in a mere continental land war, without the presence or intervention of any ships or their crews, Lord Mansfield admitted, in *Lindo* v. *Rodney*, there was no case, or authority, or principle, to enable him to bring it within the cognizance of a prize court. (*b*) The prize court extends, also, to all ransom bills upon captures at sea, and to money received as a ranson or commutation, on a capitulation to naval forces alone, or jointly with land forces. (*c*) The federal courts have asserted for the prize courts in this country a jurisdiction equally as ample and extensive as any claimed for them in England. In the case of *The Emulous*, (*d*) though the court gave no opinion as to the right of the admiralty to take cognizance of mere captures made on the land, exclusively by land forces, yet it was declared to be very clear, that its jurisdiction was not confined to captures at sea. It took cognizance of all captures in creeks, havens, and rivers, and also of all captures made on land, where the same had been made by a naval force, or by co-operation with a naval force; and this exercise of jurisdiction was settled by the most solemn adjudications. A seizure may therefore be made in court, in our own country, as prize, if made

(*a*) 1 Rob. Adm. 271.

(*a*) Lindo *v.* Rodney, Doug. 613, note.

(*b*) In the case of Alexander *v.* The Duke of Wellington, 2 Russ. & My. 35, Lord Brougham said, that military prize rests upon the same principles of law as prize at sea, though in general no statute passes with respect to it.

(*c*) Ships taken at Genoa, 4 Rob. Adm. 388; Anthon *v.* Fisher, Doug. 649, note. Maisonnaire *v.* Keating, 2 Gallison, 325.

(*d*) 1 Gallison, 563.

while the property was water-borne. Had it been landed, and remained on land, it would have deserved consideration; and no opinion was given, whether it could have been proceeded against as prize, under the admiralty jurisdiction, or whether, * if liable to seizure and condemnation in our courts, the * 358 remedy ought not to have been pursued by a process applicable to municipal confiscations.

It is understood in England, that the admiralty, merely by its own inherent powers, never exercises jurisdiction as to captures or seizures, as prize, made on shore, without the co-operation of naval forces.[1] In the case of *The Ooster Eems*, cited by Sir William Scott in the case of *The Two Friends*, (*a*) and decided by the highest authority, that of the lords commissioners of appeal, in 1784, it was held, that goods taken on shore as prize, where there had been no act of capture on the high seas, were not to be considered as prize, and that the prize courts had no jurisdiction in such a case. But it is admitted, that if the jurisdiction has once attached, and the goods have been taken at sea, they may be followed on shore by the process of the prize court, and its jurisdiction over them still continues. In this respect, the prize court seems more extensive, and to hold a firmer jurisdiction, than the instance court; for, as to cases of wreck and derelict, if the goods are once on shore, or landed, the cognizance of the common law attaches. (*b*)

Though the prize be unwarrantably carried into a foreign port, and there delivered by the captors upon security, the prize court does not lose its jurisdiction over the capture, and the questions incident to it. (*c*) So, if the prize be lost at sea, the court may, notwithstanding, proceed to adjudication, and at the instance of the captors or the claimants. (*d*) It has jurisdiction, likewise, though the prize be actually lying within a foreign neutral territory. This is the settled law of the prize jurisdiction, both in England and in this country. The principle is, that the possession of the captor, though in a neutral country, is considered to

(*a*) 1 Rob. Adm. 271.
(*b*) The Two Friends, 1 Rob. Adm. 271.
(*c*) The Peacock, 4 Rob. Adm. 185.
(*d*) The Susannah, 6 Rob. Adm. 48.

[1] Questions of Army Prize were referred by act 3 & 4 Vict. c. 65, to the Court of Admiralty. 8 Law Rev. 281.

*359 be the possession * of his sovereign, and *sub potestate curiæ*. (*a*) But, it is admitted, that if possession of the thing seized be actually as well as constructively lost, as by recapture, escape, or a voluntary discharge of the captured vessel, the jurisdiction of the prize court over the subject is lost. Though captured property be unjustifiably or illegally converted by the captors, the jurisdiction of the prize court over the case continues; but it rests in the sound discretion of the court, whether it will interfere in favor of the captors in such cases; and it is equally discretionary in all cases where the disposition of the captured vessel and crew has not been according to duty. (*b*) The prize court may always proceed *in rem*, whenever the prize, or the proceeds of the prize, can be traced to the hands of any person whatever; and this it may do, notwithstanding any stipulation in the nature of bail had been taken for the property. And it is a principle perfectly well settled, and constantly conceded and applied, that prize courts have exclusive jurisdiction, and an enlarged discretion, as to the allowance of freight, damages, expenses, and costs, in all cases of captures, and as to all torts, and personal injuries, and ill treatments, and abuse of power, connected with captures *jure belli;* and the courts will frequently award large and liberal damages in those cases.(*c*)

The prize courts may apply confiscation by way of penalty, for fraud and misconduct, in respect to property cap-
*360 tured * as prize, and claimed by citizens or neutrals. (*a*) They may decree a forfeiture of the rights of prize against captors guilty of gross irregularity or fraud, or any criminal conduct; and, in such cases, the property is condemned to the government generally. (*b*)

(*a*) *Vide Supra*, 104.

(*b*) The Falcon, 6 Rob. Adm. 194; The Pomona, 1 Dod. Adm. 25; L'Eole, 6 Rob. Adm. 220; La Dame Cecile, 6 Rob. Adm. 257; The Arabella and Madeira, 2 Gallison, 368.

(*c*) Le Caux *v.* Eden, Doug. 594; The Amiable Nancy, 1 Paine C. C. 111; Chamberlain *v.* Chandler, 3 Mason, 243, 244. Probable cause of seizure is a sufficient excuse in the case of captures *jure belli*, and as to marine torts generally, or the exercise of belligerent rights to a limited extent under statute provisions. The Palmyra, 12 Wheaton, 1.[1]

(*a*) The Johanna Tholen, 6 Rob. Adm. 72; Oswell *v.* Vigne, 15 East, 70.

(*b*) Case of The George, 1 Wheaton, 408; 2 Wheaton, 278, S. C.

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[1] See the Ostsee, 33 E. L. & Eq. 28; The Elise, 33 Id. 591.

(2.) *Criminal jurisdiction of the admiralty.*

Admiralty jurisdiction of the district courts in criminal matters.

The ordinary admiralty and maritime jurisdiction, exclusive of prize cases, embraces all civil and criminal cases of a maritime nature; and though there does not seem to be any difficulty or doubt as to the proper jurisdiction of the prize courts, there is a great deal of unsettled discussion respecting the civil and criminal jurisdiction of the District Court as an instance court, and possessing, under the constitution and Judiciary Act of 1789, admiralty and maritime jurisdiction.

The act of Congress (*c*) gives to the district courts, exclusive of the state courts, and concurrently with the circuit courts, cognizance of all crimes and offences cognizable under the authority of the United States, and committed within their districts, or upon the high seas, where only a moderate corporal punishment, or fine or imprisonment, is to be inflicted. This is the ground of the criminal jurisdiction of the district courts; and it is given to them as district courts; and as it includes the minor crimes and offences committed on the high seas, and cognizable in the courts of admiralty under the English law, the district courts may be considered as exercising the criminal jurisdiction of a court of admiralty in those cases. The constitution of the United States declares, that the judicial power of the Union shall extend to all cases of admiralty and maritime jurisdiction; and it has been supposed (*d*) that the federal courts might, without
* any statute, and under this general delegation of admi- * 361
ralty powers, have exercised criminal jurisdiction over maritime crimes and offences. But the courts of the United States have been reluctant to assume the exercise of any criminal jurisdiction, in admiralty cases, which was not specially conferred by an act of Congress. In the case of *The United States* v. *M'Gill*, (*a*) the defendant was indicted and tried in the Circuit Court at Philadelphia, for murder committed on the high seas, and the jurisdiction of the court was much discussed. One of the judges observed, that he had often decided, that the federal courts had a common law jurisdiction in criminal cases; but he considered that the crime charged (a mortal stroke having been given on the high seas, and the death in consequence of it hap-

(*c*) Act of September 24th, 1789, secs. 9 and 11.
(*d*) Du Ponceau on Jurisdiction, pp. 59 – 61.
(*a*) 4 Dallas, 426.

pening on land,) was not a case of admiralty and maritime jurisdiction within the meaning of the constitution, or of the English admiralty law, and the prisoner, on account of this defect of jurisdiction, was acquitted. The other judge of the court gave no opinion, whether that case was one of admiralty and maritime jurisdiction, upon the general principles of the admiralty and maritime law; and he confined himself to the 8th section of the Penal Act of Congress of April 30th, 1790, c. 9; and the case charged was not, by that act, within the jurisdiction of the Circuit Court.

Afterwards, in the case of *The United States* v. *Bevans*, (*b*) the Supreme Court, on a case certified from the Massachusetts circuit, decided that, even admitting that the United States had exclusive jurisdiction of all cases of admiralty and maritime jurisdiction, and admitting that a murder committed on the waters of a state where the tide ebbs and flows was a case of admiralty and maritime jurisdiction, yet that Congress had not, by the 8th section of the act of 1790, c. 9, "for the punishment of certain crimes against the United States," conferred on the courts of the
*362 United States jurisdiction over *such murder. The act confined the federal jurisdiction to murder and other crimes and offences committed on the high seas, or in any river, harbor, basin, or bay, out of the jurisdiction of any particular state; and the murder in question was committed on board of a ship of war of the United States in Boston harbor, and within the jurisdiction of Massachusetts. There was no doubt of the competency of the powers of Congress to confer such a jurisdiction in the case of a crime committed on board of a ship of war of the United States, wherever the ship might be; but no such power had, to that extent, been as yet exercised by Congress; and it must have followed of course, in that case, that the state courts had jurisdiction of the crime at common law, for it was committed within the territory of the state. (*a*) It was admitted to be a clear point, that

(*b*) 3 Wheaton, 336.

(*a*) In official opinions communicated to the executive government in 1812 and 1814, it was considered to be a clear point, that for grave crimes committed *within the jurisdictional limits of the United States*, on board national vessels of war, the trial and punishment did not belong to naval courts-martial, but to the ordinary courts of law. Opinions of the Attorneys-General, Washington, 1841, vol. i. pp. 114, 120. But the act of Congress of April 23d, 1800, c. 33, "for the better government of the navy of the United States," art. 21, declared that the crime of murder, when committed by any

the state courts had cognizance of crimes and offences committed upon tide waters, in the bays and harbors within their respective territorial jurisdictions. And in the case of *United States* v. *Wiltberger*, (*b*) it was decided that the courts of the United States had no jurisdiction of the crime of manslaughter committed by the master upon one of the seamen, on board a merchant vessel of the United States, lying at anchor in the river Tigris, within the empire of China, because the act of Congress of the 30th of April, 1790, c. 9, sec. 12, did not reach such a case, and was confined to the crime committed on the high seas. Upon the principle of that decision, the offender could not be judicially punished, except by the Chinese government; and it was said, upon the argument of the case, that China disclaimed the jurisdiction. The law was defective upon this point, and a remedy was provided by the act of Congress of 3d of March, 1825, c. 67, sec. 5, which declared, that if any offence shall be committed on board of any vessel belonging to a citizen of the United States, while lying in a foreign port or place, by any one of the crew or a passenger, on any other person belonging to the ship, or on any other passenger, the offence shall be * cognizable * 363 in the circuit courts of the United States, equally as if it had been committed on board of such vessel on the high seas, provided that if the offender shall be tried, and acquitted or convicted in the foreign state, he shall not be subject to another trial here. The act provided also for the punishment of many other crimes against the United States, committed upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty jurisdiction of the United States. But the crimes in any river, bay, &c., to be cognizable, must be committed out of the jurisdiction of any particular state, except it be conspiracies to defraud insurers; and it further provided, that the act was not to deprive the state courts of jurisdiction over the same offences. As the state courts have jurisdiction of offences committed within arms of the sea, creeks, havens, basins, and bays, within the ebb and flow of the tide, *and within the body of a county*, the jurisdiction of the circuit

officer, seaman, or marine, belonging to any public ship or vessel of the United States, *without* the territorial jurisdiction of the same, might be punished with death, by the sentence of a court-martial.

(*b*) 5 Wheaton, 76. See, also, the case of The United States *v.* Davis, 2 Sumner, 482.

courts of the United States was not extended by the statute to those cases. (*a*)

(*a*) United States *v.* Grush, 5 Mason, 290. In the case of The United States *v.* Davis & Hanlon, in the Circuit Court of the United States for the District of New York, and of The United States *v.* Jackson, (2 N. Y. Legal Observer, 3, 35,) it was held, that the federal courts have no jurisdiction under the act of Congress of April, 1790, of the crime of larceny, committed on board of an American vessel lying in the port of Savannah, in Georgia, nor if committed within the local jurisdiction of any foreign power. It would have been otherwise if committed on board the vessel on the high seas. The acts of Congress of April 30th, 1790, c. 9, and of March 3d, 1825, c. 67, are not sufficiently precise on the subject of the criminal jurisdiction of the admiralty over crimes committed on the high seas. The 8th, 9th, 10th, 11th, and 12th sections of the act of 1790, provided for the punishment of murder, robbery, and other capital and inferior offences, committed on the high seas "by any person or persons," without confining the provision specifically to American citizens, or American vessels; and yet, under that statute, it has been adjudged that robbery, committed by a foreigner on the high seas, on board of a vessel belonging exclusively to subjects of a foreign state, was not piracy within that statute, nor punishable by the courts of the United States. United States *v.* Palmer, 3 Wheaton, 610, and see *supra*, pp. 186, 187. By the same statute, the punishment of malicious maiming on the high seas is expressly confined to the offence committed in an American public or private vessel. Under the 9th section of the act of Congress of March 3d, 1825, *to provide more effectually for the punishment of certain crimes, &c.*, any offence, such as plundering shipwrecked property, *whether below or above high-water mark*, is punishable as within the jurisdiction of the federal courts. United States *v.* Coombs, 12 Peters U. S. 72. The 4th, 7th, and 8th sections of the act of 1825 are general as to murder, rape, and other specified crimes, and they apply, according to the terms of them, "to any person or persons," without defining the character of the vessel on board of which the crime may be committed. But the 6th section of the act of 1825, respecting robbery on the high seas, confines the jurisdiction to the offence committed on board of an American vessel, and so does the 22d section, respecting assaults with intent to commit a felony; while, on the other hand, by the 23d section, a conspiracy on the high seas to destroy any vessel with intent to injure the underwriters, is made felony, and the section is general, and applies to all persons.

It is difficult to understand exactly what was intended by this diversity of language in different sections, being general in one and specific in another, so far as those various sections have been construed or defined by judicial decisions. We may safely say, that so far as any crime committed upon the high seas, no matter by whom or where, amounts to piracy within the purview of the law of nations, there can be no doubt of the jurisdiction of the circuit courts of the United States. (See *supra*, pp. 186, 187.) But where the crime has not attained that "bad eminence," then the jurisdiction can only, upon proper principles, attach to crimes committed by American citizens upon the high seas, or to crimes committed in or upon an American vessel on the high seas. If the American citizen commits the crime on the high seas, on board of a foreign vessel, the personal jurisdiction over the citizen, in that case, if it exist at all, must be concurrent with the jurisdiction of the foreign government to which the vessel belongs, or by whose subjects it is owned. Under the 8th section of the act of April 30th, 1790, if an offence be committed on board of a foreign vessel by a citizen of the United States, or on board of a vessel of the United States by a foreigner, or by a citizen or foreigner on board of a piratical vessel, it is

It appears from these cases, that though the general cognizance of all cases of admiralty and maritime jurisdiction, as given by the constitution, extends equally to the criminal and civil jurisdiction of the admiralty, as known to the English and maritime law when the constitution was adopted; yet that without a particular legislative provision in the case, the federal courts do not exercise criminal jurisdiction as courts of admiralty over maritime offences.

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cognizable by the courts of the United States. United States *v.* Holmes, 5 Wheaton, 412. The act of 1825 enlarged the jurisdiction of the federal courts to offences on board of American vessels by any of the American crew, in all places and waters where the tide ebbs and flows. The act of 1835 extended the jurisdiction not only to offences on the high seas, but on any other waters within the admiralty and maritime jurisdiction of the United States. United States *v.* Lynch, 2 N. Y. Legal Observer, 51; United States *v.* Roberts, Ib. 99. In the case of the United States *v.* Mackenzie & Gansevoort, in the New York Circuit Court, January 11, 1843, it was declared, that if the Crimes Act of March 3d, 1825, c. 276, was to be considered as giving the circuit and district courts *concurrent* jurisdiction with courts-martial over offences committed on board ships of war, yet that the proviso, in the 11th section, showed that the powers of courts-martial were not abrogated or suspended, and that it was doubtful whether the courts of civil jurisdiction were under the necessity of exercising their jurisdiction. The court refused, in that case, to interfere by process, and interrupt the Naval Court of Inquiry then sitting upon the case. Afterwards, the same court, on further and more elaborate discussion and consideration, declared that the Circuit Court had no jurisdiction in the case. See *supra*, p. 341, n. *a*.

The act of Congress of March 3d, 1835, c. 40, secs. 1 and 2, punishes revolt and mutiny, or attempts at the same, by any of the crew of any American vessel on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States, by fine and imprisonment, according to the nature and aggravation of the offence; and reduces the same from the grade of a capital offence.[1] On the other hand, the act renders the master and other officers of any such vessel, at any such place, indictable, and punishable by fine and imprisonment, if without any justifiable cause, and from malice, hatred, or revenge, they beat, wound, or imprison any of the crew, or inflict any cruel and unusual punishment upon them. See Abbott on Shipping, 5th Am. edit., Boston, 1846, pp. 246 to 253. The substance is given in the notes by the learned editor, of the several acts of Congress relative to crimes and offences committed on the high seas. The principal acts on that subject are those of April 30th, 1790, c. 36; 3d March, 1825, c. 276, and March 3d, 1835, c. 40. The English law is more penal, and the statute of 11 and 12 Wm. III. c. 7, makes the crime of revolt, or endeavors to create a revolt, or to lay violent hands on a commander, piracy and robbery. Regina *v.* M'Gregor, 1 Carr. & Kir. 429.

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[1] This act embraces cases where the crew resist the master in the free and lawful exercise of his authority. Foreign seamen on board American vessels are subject to the act; and a vessel is *American*, if she sailed from and to an American port, and was apparently owned and controlled by citizens of the United States. The United States *v.* Peterson, 1 Wood. and Minot, 305. Any combination by a crew which deprives the master of the means of enforcing his authority, is an attempt to commit a revolt within the act. United States *v.* Nye, 2 Curtis C. C. 225.

In the case of *The United States* v. *Coolidge*, (*b*) it was insisted that the admiralty was a court of extensive criminal jurisdiction, and that offences of admiralty jurisdiction were exclusively cognizable by the United States; and that a marine tort on the high seas, as, for instance, the forcible rescue of a prize, was punishable by the admiralty, in the absence of positive law, by fine and im-
* 364 prisonment. The * decision of the Supreme Court was otherwise; (*a*) and it seems now to be settled, that the federal courts, as courts of admiralty, are to exercise such criminal jurisdiction as is conferred upon them expressly by acts of Congress, and that they are not to exercise any other. The United States courts have no unwritten *criminal* code to which resort can be had as a source of jurisdiction. They have none but what is conferred by Congress, and this principle extends as well to admiralty and maritime as to common-law offences. (*b*) This limitation does not, however, apply to private prosecutions in the District Court, as a court of admiralty or prize court, to recover damages for a marine tort. Such cases are cognizable in the admiralty, by virtue of its general admiralty jurisdiction, and so it was held in the case of *The Amiable Nancy*. (*c*)

(*b*) 1 Gallison, 488.

(*a*) 1 Wheaton, 415.

(*b*) United States *v.* Hudson & Goodwin, 7 Cranch, 32. United States *v.* Coolidge, 1 Wheaton, 415. United States *v.* Bevans, 3 Id. 336. United States *v.* Wiltberger, 5 Id. 76. The jurisdiction of the Supreme Court is pointed out by the constitution; but the powers of the inferior courts are regulated by statute, and they have no powers but such as the statute gives them. Smith *v.* Jackson, 1 Paine C. C. 453.

(*c*) 3 Wheaton, 546. So it is a well-established principle of the maritime law, that owners are responsible in the admiralty for the torts of their masters, in acts relative to the service of the ship, and within the scope of their employment. The State Rights, Crabbe, 22; The Rebecca, Ware Adm. 187; Abbott on Shipping, pp. 398, 399; Sherwood *v.* Hall, 3 Sumner, 131. It was held, in Chamberlain *v.* Chandler, 3 Mason 242, that the admiralty had jurisdiction of personal torts and wrongs committed on a passenger on the high seas, by the master of the ship, whether the torts were by direct force, as trespasses, or were consequential injuries. So, in Plumer *v.* Webb, 4 Mason 380, it was held, that a father or master might sue in the admiralty for wages earned by maritime service, and for torts committed on the high seas, as in the abduction of a minor or apprentice, *per quod servitium amisit*. If the tortious act happens in port, but is a continuing injury from sea, or if there be a trespass at sea upon property, and continued upon land, it becomes a maritime tort of admiralty jurisdiction. The courts of admiralty may award consequential damages in cases of marine tort; Betsey Caines's case, 2 Hagg. Adm. 28; and courts of common law have also jurisdiction, concurrently with the instance court of admiralty, in cases of marine trespass, free from the question of prize. Percival *v.* Hickley, 18 Johns. 257. Wilson *v.* Mackenzie, 7 Hill (N. Y.) 95. The

The civil jurisdiction of the English admiralty is according to the forms of the civil law, and before a single judge; but the criminal jurisdiction, in which all maritime felonies are tried, is in the court of admiralty sessions, before commissioners of oyer and terminer, being the judge of the court of admiralty, and three or four associates. It has cognizance of all crimes and offences committed at sea, or on the coasts, out of the body of a county; and in that court, the proceedings are by indictment and trial by jury, according to the course of the common law. (*d*) The criminal jurisdiction of the English admiralty received its present modification by the act of 28 Henry VIII. c. 15; but it had a very extensive criminal jurisdiction, coeval with the first existence of the court. It proceeded by indictment and * petit jury, * 365 before, and independent of, the statute of Henry VIII.; and all criminal offences cognizable by the admiralty, and not otherwise provided for by positive law, are punishable by fine and imprisonment. (*a*) The better opinion, however, is, that the ancient common law, or primitive criminal jurisdiction of the English admiralty, has become obsolete, and has not been in exercise for the last one hundred years; and that no offence of a criminal nature can be tried there, which does not fall within the jurisdiction specially conferred by the statute of Henry VIII. (*b*) There is, therefore, a very strong precedent for the doctrine of the Supreme Court of the United States, which refuses to the federal courts any criminal jurisdiction in admiralty cases, not derived from statute.

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admiralty can take jurisdiction of a suit for *damages* in the nature of a breach of a maritime contract, even though the ship did not enter on the voyage. Abbott on Shipping, part 4, c. 4, sec. 2; case of The City of London, in the Adm., Nov. 1839. See Curtis's Treatise on Seamen, pp. 300, 356. But if a tort be committed by a master on one of the crew *on shore*, or in a *foreign port*, in the course of the voyage, it is a case of common-law jurisdiction, and the admiralty cannot draw to it a tort on shore, though it be a *gravamen*, mixed up with a tort on the high seas. Adams *v.* Haffards, 20 Pick. 127. The admiralty, says Mr. Justice Story, does not claim any jurisdiction over torts, except maritime torts committed on the high seas, or on waters within the ebb and flow of the tide. Where those waters are *within the body of a county*, the learned judge would seem to differ from the courts of common law, for they deny the admiralty jurisdiction in the latter case. The objection to the admiralty jurisdiction does not apply in the case of tide waters in foreign countries, where the distinction of counties is unknown. Thomas *v.* Lane, 2 Sumner, 9, 10.

(*d*) 4 Blacks. Comm. 269.

(*a*) 4 Rob. Adm. 74, note.

(*b*) 2 Bro. Civ. and Adm. Law, Appendix, No. 3; Opinion of Law Officers of the Crown, Ibid.

And to whatever extent the criminal jurisdiction of the admiralty may extend, the Judiciary Act of 1789 provides, that the trial of all issues in fact in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury.

Limits of admiralty jurisdiction.

(3.) *Division line between the jurisdiction of the admiralty and of courts of common law.*

There has existed a very contested question, and of ancient standing, touching the proper division or boundary line between the jurisdiction of the courts of common law and the courts of admiralty. The admiralty jurisdiction in England originally extended to all crimes and offences committed upon the sea, and in all ports, rivers, and arms of the sea, as far as the tide ebbed and flowed. Lord Coke's doctrine was, (*c*) that the sea did not include any navigable waters within the body of a county; and Sir Matthew Hale supposed, (*d*) that prior to the statute of 35th Edw. III. the common law and the admiralty exercised jurisdiction
* 366 concurrently * in the narrow seas, and in ports and havens within the ebb and flow of the tide. Under the statutes of 13 R. II. c. 5, and 15 R. II. c. 3, excluding the admiralty jurisdiction in cases arising upon land or water within the body of a county, except in cases of murder and mayhem, there have been long and vexatious contentions between the admiralty and the common-law courts. On the sea-shore the common-law jurisdiction is bounded by low-water mark where the main sea begins; and between high and low water mark, where the sea ebbs and flows, the common law and the admiralty have a divided or alternate jurisdiction. (*a*)

With respect to the admiralty jurisdiction over arms of the sea, and bays and navigable rivers, where the tide ebbs and flows, there has been great difference of opinion, and great litigation, in the progress of the English jurisprudence. On the part of the admiralty it has been insisted, that the admiralty continued to possess jurisdiction in all ports, havens, and navigable rivers, where the sea ebbs and flows below the first bridges. This seemed also to be the opinion of ten of the judges of Westminster, on a reference

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(*c*) 4 Inst. 135. (*d*) 2 Hale P. C. c. 3.

(*a*) 1 Blacks. Comm. 112; Constable's case, 5 Co. 106, 107; Barber *v.* Wharton, 2 Lord Raym. 1452; 2 East P. C. 803; 4 Blacks. Comm. 268; The King *v.* Forty-nine Casks of Brandy, 3 Hagg. Adm. 257. The jurisdiction of the admiralty subsists when the shore is covered with water, and the jurisdiction of the common law when the land is left dry. The Pauline, 2 Rob. Adm. 358.

to them in 1713. (*b*) On the part of the common-law courts it has been contended, that the bodies of counties comprehended all navigable rivers, creeks, ports, harbors, and arms of the sea, which are so narrow as to permit a person to discern and attest upon oath, anything done on the other shore, and as to enable an inquisition of the facts to be taken. (*c*) In * the case of *Bruce*, (*a*) in 1812, all the judges agreed, that the common law and the admiralty had a concurrent jurisdiction in bays, havens, creeks, &c., where ships of war floated. The high seas mean the waters of the ocean without the boundary of any county, and they are within the exclusive jurisdiction of the admiralty up to high-water mark when the tide is full. The open ocean which washes the sea-coast is used in contradistinction to arms of the sea enclosed within the *fauces terræ*, or narrow headlands or promontories; and under this head is included rivers, harbors, creeks, basins, bays, &c., where the tide ebbs and flows. They are within the admiralty and maritime jurisdiction of the United States; but if they are within the body of a county of any particular state, the state jurisdiction attaches. (*b*)

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(*b*) Cited in Andrew, 232.

(*c*) King *v.* Soleguard, Andrew, 231; The resolution of the judges, in 1632, cited in 2 Bro. Civ. and Adm. Law, 78; Stanton J., Fitz. Abr. Corone. 399, 8 Edw. II; 4 Inst. 140; Hawkins P. C. b. 2, c. 9, sec. 14; 2 East P. C. 804; 5 Wheaton, 106, note; Com. Dig. tit. Adm. E. 7, 14; United States *v.* Grush, 5 Mason, 290.

(*a*) 2 Leach's Crown Cases, 1093, case 353, 4th edit.

(*b*) Hale Hist. P. C. vol. i. p. 424; Ibid. vol. ii. pp. 13, 18, 54; 3 Inst. 113; Constable's case, 5 Co. 106 a; Lord Hale, Harg. L. T. c. 4, p. 10; United States *v.* Grush, 5 Mason, 290. In the United States District Court for Connecticut, January 7th, 1840, in the case of Gedney *v.* Schooner L'Amistad, the judge held, that a vessel on tide waters, off Shore, within Montauk Point, and five miles from it, and eighteen miles from New London, and a half a mile from Long Island shore, and not in any known harbor, was on *the high seas*, and within the admiralty jurisdiction. The high seas imported the open ocean without the *fauces terræ*. The Schooner Harriet, 1 Story C. C. 259. In case of The Public Opinion, 2 Hagg. Adm. 398, it was held, that the admiralty had not jurisdiction of a case arising in the Humber, twenty miles from the sea, but within the flux and reflux of the tide, because it was *infra corpus comitatus*. But in the Northern District Court of the United States in New York, in the case of Van Santvort *v.* The Boat John B. Cole, in 1846, it was decided, that a contract to be performed on board of a canal-boat at Albany, being within the ebb and flow of the tide on the navigable Hudson, for the delivery of a cargo of flour in New York, was a maritime contract, relating to the business of navigation and trade, and within the admiralty jurisdiction. The New York Legal Observer for October, 1846.[1]

In Thomas *v.* Lane, 2 Sumner R. I., in the case of a libel for a maritime tort, it

[1] It is not necessary that the voyage should be limited to tide waters, to give admiralty jurisdiction. The Robert Morris, Wallace Jun. 33.

The extent of the jurisdiction of the district courts, as courts of admiralty and maritime jurisdiction, was very fully examined,

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was admitted that the admiralty had no jurisdiction over torts, except those that were maritime or committed on the high seas, or on waters *within the ebb and flow of the tide*, and that the courts of common law denied the jurisdiction, if the waters are *within the body of the county*. It was held, however, to be a clear point, that the exception did not apply to *tide waters in foreign countries*, and that the admiralty jurisdiction attached to torts on such waters, but the libel must aver that the trespass was on tide water in a foreign port, and it cannot be taken by intendment. It was doubted in the case of United States *v.* Davis, 2 Sumner, 482, whether a place at Raiatea, one of the Society Islands, within a coral reef, covered at high and uncovered at low water, was to be deemed the high seas, so as to confer criminal jurisdiction; for a place may at high water be the high seas, and at low water strictly part of the land, as in case of the sea-shore, according to the doctrine in Constable's case, 5 Co. 106 a. It was expressly held, in the cases of United States *v.* Ross, 1 Gallison, 624, and in the United States *v.* Pirates, 5 Wheaton, 184, that a vessel in an open roadstead, within a marine league of the shore, was *upon the high seas*, under the 8th section of the act of 30th April, 1790, c. 9, sec. 8, so as to give jurisdiction to the courts of the United States. The high seas in that act mean any waters on the sea-coast, which are without the boundaries of low-water mark. And yet again it was held, in the case of the United States *v.* Robinson, 4 Mason, 307, that an offence committed in a bay entirely land-locked and enclosed by reefs, was not committed on the high seas. The cases are so conflicting, that it seems impossible to arrive at any definite conclusions on the subject.

It seems to be conceded that the admiralty has an established jurisdiction to award *damages for torts*, or personal wrongs done on the high seas; and that waters within the ebb and flow of the tide, and which lie within the body of a county, are not, in England, within the admiralty jurisdiction; Coke's 4th Inst. 134; 2 Brown's Civ. and Adm. Law, 111; The Nicolaas Witzen, 3 Hagg. Adm. 369; but that in the United States all tide waters, though within the body of a county, are within the admiralty jurisdiction, and torts committed on such waters are cognizable in the admiralty. See Curtis's Treatise on Seamen, p. 362, and the cases there cited. Nay, if the tort be one continued act, though commencing on land and be consummated on tide water, the admiralty has cognizance of it. Plumer *v.* Webb, 4 Mason, 383, 384; Steele *v.* Thatcher, Ware Adm. 91. It is admitted, however, that the courts of common law have in this country concurrent jurisdiction over mariners' contracts, and in cases of tort committed upon the high seas. But as these courts are not competent to give a remedy *in rem*, the remedy is a personal suit.

In the case of The Steamboat Black Hawk, decided in the District Court for the Northern District of New York, (Conkling's Treatise, 2d edit. p. 350, note,) it was held, that seizures made on the St. Lawrence, far above tide waters, as at Ogdensburgh and on Lake Ontario, for infractions of the navigation laws of the United States, were cases of admiralty jurisdiction. The learned judge put the decision on the ground of uniform practice for half a century duly acquiesced in; but he admitted with great candor, that the jurisdiction on the admiralty side of the court might reasonably be questioned, though it was not for that court, under the extraordinary sanction given to the practice, to renounce it. In Wyman *v.* Hurlburt, 12 Ohio, 81, the court waived the question whether the great lakes, above the ebb and flow of tides, were subject to the jurisdiction of the courts of admiralty. But now, by act of Congress of February 26th, 1845, c. 20, the district courts have the same jurisdiction in matters of contract and tort, concerning steamboats and other vessels of 20 tons bur-

and with great ability and research, by the Circuit Court of the United States for Massachusetts, in the insurance case of *De Lovio* v. *Boit.* (*c*) It was maintained, that in very early periods the admiralty jurisdiction, in civil cases, extended to all maritime causes and contracts, and in criminal cases to all torts and offences, as well in ports and havens within the ebb and flow of the tide, as upon the high seas; and that the English admiralty was formed upon the same common model, and was coextensive in point of jurisdiction with the maritime courts of the other commercial powers of Europe. It was shown, by an exposition of the

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den and upwards, enrolled and licensed for the coasting trade, and employed in business of commerce and navigation between ports and places in different states and territories, upon the lakes and navigable waters[2] connecting said lakes, as is now exercised and possessed by the said courts in cases of like steamboats and other vessels employed in navigation and commerce upon the high seas, or tide waters within the admiralty and maritime jurisdiction of the United States. The maritime law of the United States, as far as the same is or may be applicable thereto, shall constitute the rule of decision in such suits, in the same manner and to the same extent, and with the same equities as it now does in cases of admiralty and maritime jurisdiction, with saving of the right of trial by jury, and of a concurrent remedy at common law in competent cases.[3]

(*c*) 2 Gallison, 398; The J. D. Morton, 2 Ohio State, 26.

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[2] The words "navigable waters" may include an artificial communication by canal. The Young America, 1 Newberry Adm. 101.

[3] The jurisdiction of the District Court in cases of admiralty does not rest on the statute of 1845, but upon the Constitution of the United States, and is not limited to tide waters, but embraces the lakes and navigable rivers, through which commerce is carried on between different states or with a foreign nation. The Backus, 1 Newberry Adm. 1.

And in the case of the Jenny Lind, 1 Newberry Adm. 443, the court say, the admiralty jurisdiction has been clearly established upon the whole length and breadth of the Mississippi River, and all other public rivers as far as they are navigable from the ocean for vessels of ten tons burden. And in the case of Jackson *v.* Steamboat Magnolia, (20 How. U. S. 296,) the principles of these cases were fully affirmed, and the Supreme Court held that the U. S. District Court for the Middle District of Alabama had jurisdiction over a case of collison occurring on the Alabama River, within the body of a county and above tide water, and although the Alabama River flows through the State of Alabama and is not a boundary between co-terminous states. Mr. Justice Catron, Mr. Justice Daniel, and Mr. Justice Campbell dissented. Mr. Justice Catron declared that he "felt constrained solemnly to protest against the opinion of the court and the doctrine assumed in its support," as a violation of the constitution, and Mr. Justice Catron and Mr. Justice Campbell also insisted that the claim of the court was unconstitutional, and said they considered, "that the decision carries the jurisdiction to an incalculable extent beyond any other and all others that have heretofore been pronounced, and that it must create a revolution in the admiralty administration of the courts of the United States."

ancient cases, that Lord Coke was mistaken, in his attempt to confine the ancient jurisdiction of the admiralty to the high seas, and to exclude it from the narrow tide waters, and
* 368 * from ports and havens. The court agreed with the admiralty civilians, that the statutes of 13 R. II. and 15 R. II. and 2 H. IV., did not curtail this ancient and original jurisdiction of the admiralty, and that, consistently with those statutes, the admiralty might exercise jurisdiction over torts and injuries upon the high seas, and in ports within the ebb and flow of the tide, and in great streams below the first bridges; and also over all maritime contracts, as well as over matters of prize and its incidents. It appeared, from an historical review of the progress of the controversy for jurisdiction, which lasted for two centuries, between the admiralty and the courts of common law, that the latter, by a silent and steady march, gained ground, and extended their limits, until they acquired concurrent jurisdiction over all maritime causes, except prize causes, within the cognizance of the admiralty. The common-law doctrine was, that the sea, *ex vi termini*, was without the body of any county; but that all ports and havens, and all navigable tide waters, where one might see from one land to the other what was doing, were within the body of the county, and under the exclusive jurisdiction of the common-law courts. On the sea-shore or coast, high and low water mark determine what was parcel of the sea, and what was the line of division between the admiralty and the courts of law; and it was held that it ought to be so considered, by parity of reasoning, where the tide ebbs and flows, in ports and havens; and that the admiralty jurisdiction extends to all tide waters in ports and havens, and rivers below the first bridges. It was admitted, however, that the common law originally had jurisdiction on the high seas, concurrent with the admiralty; and that in cases manifestly within the admiralty jurisdiction, both civil and criminal, the common law now claimed concurrent jurisdiction.

The result of the examination in that case was, that the jurisdiction of the admiralty, until the statutes of Richard II., extended to all maritime contracts, and to all torts, injuries, and of-
* 369 fences on the high seas, and in ports and * havens, as far as the ebb and flow of the tide; that the common law interpretation of those statutes abridged this jurisdiction to things wholly and exclusively done upon the sea, but that the interpre-

tation was indefensible upon principle, and the decisions founded upon it inconsistent; that the admiralty interpretation of those statutes did not abridge any of its ancient jurisdiction, and *that* interpretation was consistent with the language and intent of the statutes, and analogous reasoning, and public convenience. It was considered that the decisions at common law on this subject were not entitled to outweigh the decisions of the great civilians of the admiralty. The vice-admiralty courts in this country, under the colonial governments, exercised a most ample jurisdiction, to the extent now claimed, over all maritime contracts, and over torts and injuries, as well in ports as upon the high seas; and the constitution of the United States, when it conferred not only admiralty but *maritime* jurisdiction, added that word *ex industria*, to remove every latent doubt. This large and liberal construction of the admiralty powers of the district courts, and their extension to all maritime contracts, torts, and injuries, was recommended by the general equity and simplicity of admiralty proceedings, and the policy and wisdom of that code of maritime law, which had embodied the enlightened reason of the civil law, and the customs and usages of the maritime nations, and regulates, by its decisions, the commercial intercourse of mankind. (*a*)

(*a*) Judge Story stated, in this case, that all civilians and jurists agreed that maritime contracts included, among other things, charter-parties, affreightments, marine hypothecations, contracts for marine service in the building, repairing, supplying, and navigating ships, contracts between part-owners of ships, contracts and quasi-contracts, respecting averages, contributions, and of missions and policies of insurance. He said that admiralty courts of other foreign countries had exercised jurisdiction over policies of insurance as maritime contracts.[1]

[1] The subject came before the Supreme Court in N. J. Steam Nav. Co. *v.* Merchants' Bank, 6 How. U. S. 344, and was much considered. A decree of the Circuit Court of R. Island, in admiralty, upon a libel *in personam*, against a steamboat company for the loss by fire of specie carried in their boat, was affirmed by a majority of the court. It was considered by Mr. Justice Nelson, in delivering the opinion of the court, (p. 386,) that the grant of power in the constitution could not have had reference to the admiralty jurisdiction exercised in England at the time of the formation of the constitution; and even if such was to be regarded as the fact, it was shown that the practical construction given to the constitution, both by the legislative and judicial departments, had asserted and upheld a much more comprehensive jurisdiction. A line of jurisdiction had been established which fully embraced the *contract* in question. In Morewood *v.* Enequist, 23 How. U. S. 491, it was again decided that the admiralty jurisdiction of the federal courts extends to contracts of charter party and affreightment. These were held to be maritime contracts within the true meaning of the constitution and the act of

This enlarged extension of the civil jurisdiction of the admiralty, as declared in the Circuit Court in Massachusetts, remains to be discussed, and definitively settled, in the Supreme Court.[1] It has been subsequently and frequently asserted in the circuit and district courts. Thus, in *Plumer* v. *Webb*, (*b*) the jurisdiction of the admiralty over all maritime contracts, upon the
* 370 doctrine of the * case of *De Lovio* v. *Boit*, was declared, and it was considered, that, inasmuch as courts of admiralty act as courts of equity and administer justice upon the same

(*b*) 4 Mason, 380.

Congress, and as such cognizable in the admiralty courts of the Union by process either *in rem* or *in personam*. In Waring *v.* Clarke, 5 How. U. S. 441, where the same general principles are established, it was held, that admiralty has jurisdiction in cases of tort and collision as far up rivers as the tide ebbs and flows, although it may be *infra corpus comitatus*. The clause in the Judiciary Act, saving to suitors common-law remedies in certain cases, means that, in cases of concurrent common-law and admiralty jurisdiction, the common-law jurisdiction is not taken away.

The admiralty jurisdiction does not extend to cases where a lien is claimed by the builders of a vessel for work and materials used in the construction, and where the local law of the state in which the vessel is built does not give a lien upon it for construction. The People's Ferry Co. *v.* Beers, 20 How. U. S. 393. In Roach et al. *v.* Chapman et al. 22 How. U. S. 129, the jurisdiction was denied, although the local law gave such a lien, the vessel not being built upon tide waters. Nor is it a case of admiralty cognizance where a contract of partnership was made by which one of the parties was to contribute a vessel and the other his labor and skill. Ward *v.* Thompson, 22 How. U. S. 330, where a vessel was lost by being run on shore in order to save the lives of the crew, and a libel *in personam* was filed by the owner of the vessel against the consignee of the cargo, for a contribution by way of general average, it was held, that the admiralty courts of the United States had not jurisdiction. Jurisdiction is confined to cases where the vessel or cargo, under the maritime law, is subject to an *absolute* lien; in cases of general average the lien is a qualified one, depending upon possession of the goods, and ceases when they are delivered over to the consignee. Cutler *v.* Rae, 7 How. U. S. 729. This important constitutional question was decided under circumstances which perhaps may not preclude a re-examination. Mr. Justice Wayne expressed a determination not to regard the decision as an authority, should the question again rise. In The United States *v.* The New Bedford Bridge, 1 Wood & Minot, 401, Mr. Justice Woodbury has given the subject of admiralty jurisdiction a most learned and exhaustive examination. His opinion fills *more than one hundred pages* of the report.

By virtue of the contract of affreightment, the jurisdiction of the admiralty extends to a libel *in personam* filed against the owners of a ship by the owners of a cargo, to recover salvage money, which they had been compelled to pay on account of the fraudulent conduct of the master. Church *v.* Shelton, 2 Curtis C. C. 271.

[1] In a case recently decided in the first circuit, it was the language of the court, that, until a contrary decision be made by the Supreme Court, the admiralty jurisdiction must be held in that circuit to extend to policies of insurance. Gloucester Ins. Co. *v.* Younger, 2 Curtis C. C. 322.

principles, and with equal safety, maritime contracts were suitable objects of such a jurisdiction; and especially as such contracts require a liberal interpretation and enlarged good faith, and the application of a comprehensive equity. So in *Steele* v. *Thatcher*, and *Drinkwater* v. *The Brig Spartan*, in the District Court for Maine, the doctrine in *De Lovio* v. *Boit* was explicitly recognized as sound. (*a*) It was declared to have been before the public for twelve years, without having its reasoning met, or its conclusions shaken; and it was adjudged that the admiralty had a general jurisdiction over maritime contracts; and the circumstance that the contract was under seal did not affect the jurisdiction, though it was admitted that in England the courts of law would grant a prohibition in such a case. The broad jurisdiction of the American courts of admiralty, over all executed maritime contracts, (for the jurisdiction is confined to executed contracts,) (*b*) and all cases of a maritime nature, has been equally asserted in the circuit courts of the United States at New York and Philadelphia, founded on the language of the constitution, and the Judiciary Act of 1789. (*c*) This enlarged admiralty cognizance of civil causes was elaborately vindicated, on principles of reason, as well as on the ground of authority, in the case of *The Schooner Tilton*. (*d*) It was there held, that the admiralty had jurisdiction of all causes of a maritime nature, inclusive of questions of prize, whether they arose from contracts or from torts. The jurisdiction was clear, in all matters that concerned owners and proprie-

(*a*) Ware Adm. 91, 149.

(*b*) 3 Mason, 16, 17.

(*c*) The Sloop Mary, 1 Paine C. C. 673; Wilmer *v.* The Smilax, 2 Peters Adm. 295 n., and Davis & Brooks *v.* Brig Seneca, Gilp. 10, in the Circuit Court of the Pennsylvania district.

(*d*) 5 Mason's Rep. 465. It is not disputed that courts of admiralty have jurisdiction over charter-parties and maritime contracts generally, but not over preliminary contracts leading thereto. Andrews *v.* Essex F. & M. Ins. Company, 3 Mason, 6. The Schooner Tribune, 3 Sumner, 144.[1]

[1] The S. C. Ives, 1 Newberry Adm. 205. Admiralty, it is said, has no jurisdiction to enforce the specific performance of an agreement relating to maritime affairs. Davis *v.* Child, 1 Davies Dist. Ct. 71. But see *ante*, p. [369] *note* (1). In the English admiralty, in a case where A signed shipping articles, and entered as mate, and the articles contained an agreement that he should enter on a voyage to Galatz, and then be discharged, it was held, that the contract being special, the court had no jurisdiction to award what was due on the breach. The Debreczia, 12 Jurist, R. of S. 143, 1848. The ship did not sail on the voyage.

tors of ships, as such. It was observed that suits in the
* 371 admiralty, touching * property in ships, were either *petitory* suits, in which the mere title to the property is litigated and sought to be enforced, or they were *possessory* suits, to restore to the owner the possession, which he had under a claim of title. The jurisdiction over both classes of cases was exercised by the admiralty, until some time after the restoration in 1660, when the courts of law interfered, and claimed the exclusive cognizance of mere questions of title; and the admiralty jurisdiction over petitory suits has been, in England, abandoned for a considerable length of time, though it is constantly upheld as to possessory suits. (*a*) The distinction does not appear to rest on any sound principle, for the question of title is necessarily involved in that of the possession; and it is admitted by the courts of law (*b*) that the admiralty possesses authority to decree restitution of a ship unlawfully withheld by a wrong-doer from the real owner. In the case of illegal captures, and of bottomry, salvage, and marine torts, the admiralty courts in this country inquire into and decide on the rights and titles involved in the controversy;[1] and where they have jurisdiction of the principal matter, it is suitable, and according to the analogies of law, that they should possess it over the incidents.[2] Notwithstanding the English practice to the contrary, the admiralty in this country claim to possess a rightful jurisdiction equally over petitory and possessory suits. (*c*)[3]

(*a*) Haly *v.* Goodson, 2 Meriv. 77; Lord Stowell in the cases of The Aurora, 3 Rob. Adm. 133, 136; The Warrior, 2 Dod. Adm. 288; and The Pitt, 1 Hagg. Adm. 240; 2 Bro. Civ. & Adm. Law, 114, 115.

(*b*) In the matter of Blanchard, 2 Barn. & Cress. 244.

(*c*) The Schooner Tilton, 5 Mason, 465; Ware Judge, in Ware, 248, S. P. In the case of The Schooner Volunteer and Cargo, 1 Sumner, 551, Mr. Justice Story reasserted, with undiminished confidence, the rightful jurisdiction of the American admiralty over charter-parties and all other maritime contracts, whether made in foreign

[1] It is held, that courts of common law have jurisdiction to determine questions of salvage. They may entertain suits to redeem property claimed to be held by a salvage lien, if no suit is pending in admiralty. Cashmere *v.* De Wolf, 2 Sandf. (N. Y.) 379.

[2] Although the remedy on the mortgage of a ship, as on the mortgage of any other chattel, is to be sought in the common-law courts, yet, where an admiralty court has sold a ship on a bottomry bond, the previous mortgagee of the ship will be allowed to interpose a claim in admiralty upon the balance of the proceeds. 2 Wood. & Minot, 93, 118.

[3] Taylor *v.* Royal Saxon, 1 Wallace Jr. C. C. 311; Ward *v.* Peck, 18 How. U. S. 267; The Friendship, 2 Curtis C. C. 426.

With respect to the criminal jurisdiction of the admiralty, we have already seen that the courts of the United States do not

parts or at home, as matters *juris et de jure*, and that the court might proceed *in rem* where there was a lien, and *in personam* where no such lien existed. He reviewed, with his usual accuracy and spirit, the history of the question of admiralty jurisdiction, as he had already done more at large in De Lovio *v.* Boit. See *supra*, 367. On the other hand, in Bains *v.* The Schooner James and Catharine, 1 Baldwin C. C. 544, Judge Baldwin held, that admiralty jurisdiction, under the constitution of the United States, was to be considered as *restrained* by the statutes and common law of England before the Revolution, and as exercised by the state courts before the adoption of the constitution. It is high time that this vexed question of admiralty jurisdiction under the Constitution of the United States, should be put at rest by a final decision in the Supreme Court of the United States.[4] The Court of Appeals in Kentucky in the case of Case, &c. *v.* Woolley, 6 Dana, 21, do indeed consider the question as authoritatively settled by the cases of De Lovio *v.* Boit, Plumer *v.* Webb, Drinkwater *v.* The Brig Spartan, The Steamboat Thomas Jefferson, and Peyroux *v.* Howard, that a civil cause arising where the tide ebbs and flows, *even though it may be within a county*, was a case of admiralty or maritime jurisdiction. Mr. Curtis, in his Treatise on the Rights and Duties of Merchant Seamen, pp. 252, 253, 260, concludes his examination of the cases, with the proposition, that all persons on board a vessel engaged in service, and whose service is of a maritime character, and in the business and employment of the vessel, have a present standing in the admiralty, and come within its jurisdiction, and can sue *in personam*, and, where there is a lien, *in rem*.[5]

The jurisdiction of the English admiralty has been enlarged, and doubtful points settled by the statute of 3 and 4 Victoria, c. 63, passed 7th August, 1840. It is entitled "An Act to improve the Practice and extend the Jurisdiction of the High Court of Admiralty of England." The Dean of the Arches is made an assistant judge of the admiralty court, with concurrent authority. Jurisdiction is given over the claims

[4] See note (1), *ante*, p. 369.

[5] See an able note on this subject, to the case of The Huntress, 1 Davies Dist. Ct. p. 93, by Mr. Justice Ware. The court will not decline jurisdiction of an appeal in the case of personal damage, brought by an American seaman serving on board of a British vessel, when the voyage was terminated here, and the master was domiciled in the United States. Patch *v.* Marshall, 1 Curtis C. C. 452. If the contract be maritime in its nature and subject, the court has jurisdiction, though the vessel has not entered on its performance. This applies to contracts for the carriage of passengers, as well as freight. The Pacific, 1 Blatch. C. C. 569; The Aberfoyle, Ibid. 360.

The admiralty jurisdiction cannot be invoked by foreign seamen as matter of right. But the court may intervene in their behalf when the circumstances of the case raise the presumption of a request to that effect from the foreign government. Gonzales *v.* Minor, 2 Wallace Jr. C. C. 348: as where the voyage has been broken up, or delay would materially affect the seaman's remedies; Davis *v.* Leslie, 1 Abbott Adm. 123; Bucker *v.* Klorkgeter, Id. 402: notwithstanding his agreement in the shipping articles not to sue in any foreign court.

The services rendered by stevedores, The Amstel, 1 Bl. & Howl. 215; The Joseph Cunard, Olcott, Adm. 120, by a mere ship-keeper, Gurney *v.* Crockett, 2 Abbott Adm. 490, or in scraping the ship's bottom preparatory to coppering her, Bradley *v.* Bolles, 2 Abbott Adm. 569, are not recognized in the admiralty as maritime services.

assume any jurisdiction which is not expressly conferred by an act of Congress; and the argument for the extension of
*372 the *civil* jurisdiction of the admiralty beyond *the limits known and established in the English law, *at the time of the formation of our constitution*, is not free from very great difficulty.

It has been made a question, what were the "cases of admiralty and maritime jurisdiction," within the meaning of the constitution of the United States. It is not in the power of Congress to enlarge that jurisdiction beyond what was understood and intended by it when the constitution was adopted, because it would be depriving the suitor of the right of trial by jury, which is secured to him by the constitution in suits at common law; and it is well known that in civil suits of admiralty and maritime jurisdiction, the proceedings are according to the course of the civil law, and without jury. If the admiralty and maritime jurisdiction of the district courts embraces all maritime contracts, then suits upon policies of insurance, charter-parties, marine hypothecations, contracts for building, repairing, supplying, and navigating ships, and contracts between part owners of ships, must be tried in the admiralty by a single judge, to the exclusion of the

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of mortgagees of ships, over all questions as to the title to ownership of any ship or vessel, or the proceeds thereof remaining in the registry, arising in any case of possession, salvage, damage, wages, and bottomry. Jurisdiction is given over all claims and demands in the nature of salvage, for services rendered to, or damages received by, any ship or sea-going vessel, or in the nature of salvage or for necessaries supplied to any ship or sea-going vessel, or in the nature of salvage, or for necessaries supplied to any foreign ship or sea-going vessel, and to enforce the payment thereof, whether such ship or vessel may have been within the body of a county or upon the high seas at the time. The court may direct issues of fact to be tried by a jury, before a judge of one of the courts of law at Westminster, and the judge of the admiralty is to have the like protection as other judges in the exercise of his jurisdiction. Concurrent jurisdiction over all these subjects and causes of action is retained in the courts of law.

A synopsis of the admiralty jurisdiction *in this country* is stated to contain, 1. Contracts between part owners, petitory and possessory suits: 2. Charter-parties and affreightments: 3. Bottomry and hypothecation: 4. Contracts of material men: 5. Insurance: 6. Wages: 7. Salvage, civil and military: 8. Averages, contributions, and jettisons: 9. Pilotage: 10. Ransom: 11. Surveys: 12. Maritime torts and trespasses. The Jurist, for January, 1841, p. 408. All the above causes of action, except those arising on insurance, ransom, and surveys, now belong to the English Court of Admiralty.[1]

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[1] There is no jurisdiction in admiralty to decree a sale of a mortgaged ship, or to transfer the possession of it to the mortgagee. Bogart *v.* Steamboat John Jay, 17 How. U. S. 399.

trial by jury; and the state courts would be devested, at one stroke, of a vast field of commercial jurisdiction. The words of the Judiciary Act of 1789, sec. 9, are, that the district courts shall have "*exclusive* original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation, or trade of the United States, where the seizures are made on waters which are navigable from the sea, by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas." But the act adds, by way of qualification to this designation of admiralty jurisdiction, these words, viz.: "saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it."

The act of Congress is rather ambiguous in its meaning, and leaves it uncertain whether it meant to consider seizure on tide waters, in ports, harbors, creeks, and arms of the sea, as cases of admiralty and maritime jurisdiction, or as * cases * 373 simply within the cognizance of the district courts; for the expression is *including*, that is, comprehending, either within the cognizance of the court, or within the class of cases of admiralty jurisdiction, all seizures under laws of impost, navigation, and trade, on waters navigable from the sea, by small vessels of ten tons burden. This act has, however, been construed to put a construction upon the words "admiralty and maritime jurisdiction," conformable to the claims of the civilians, and in opposition to the claims of the common-law tribunals; and there is a series of decisions in the Supreme Court of the United States to that effect.

In the case of *The United States* v. *La Vengeance*, (*a*) a French privateer was libelled in the District Court of New York for an attempt to export arms from the United States to a foreign country contrary to law. She was adjudged to be forfeited to the United States. The decree, on appeal to the Circuit Court, was reversed. On a further appeal to the Supreme Court of the United States, it was contended, that this was a criminal case, both on account of the manner of prosecution, and the matter charged; and, therefore, that the decree of the District Court was final; and that it ought likewise to have been tried by a jury in the District Court; and that, if it was even a civil suit, it was not a case of admiralty

(*a*) 3 Dallas, 297.

and maritime jurisdiction. To render it such, the cause must arise wholly upon the sea, and not in a bay, harbor, or water, within the precincts of any county of a state. But the Supreme Court decided that it was a civil suit, not of common law, but of admiralty and maritime jurisdiction. The seizure was on the waters of the United States. The process was *in rem*, and did not, in any degree, touch the person, and no jury was necessary.

Afterwards, in the case of *The United States* v. *The Schooner Sally*, (*b*) the vessel was libelled in the District Court, as
* 374 forfeited for being concerned in * the slave-trade; and this was also held, on appeal, to be a case, not of common-law, but of admiralty jurisdiction. So, in the case of *The United States* v. *The Schooner Betsey*, (*a*) it was held, that all seizures under the act of Congress suspending commercial intercourse with a foreign country, and made on waters navigable from sea, by vessels of ten tons burden, were civil causes of admiralty jurisdiction, being proceedings *in rem*, and not according to the course of the common law, and were to be tried without a jury. The court said, that the place of seizure being on navigable waters decided the jurisdiction, and that the act of Congress meant to make seizures on waters navigable from the sea civil causes of admiralty and maritime jurisdiction. In this last case, the counsel for the claimant contended that the seizure was made within the body of a county, for a breach of a municipal law of trade, and that though it belonged to the jurisdiction of the District Court, it was not a case of admiralty cognizance. All seizures, in England, for violation of the laws of revenue, trade, or navigation, were tried by a jury in the Court of Exchequer, according to the course of the common law; and though a proceeding be *in rem*, it is not necessarily a proceeding or cause in the admiralty.

In the case of *The Samuel*, (*b*) where the vessel and cargo were seized and libelled, and condemned in the District Court of Rhode Island, for a breach of the non-importation laws of the United States, the same objection was made upon appeal to the Supreme Court, and it was again overruled, on the authority of the preceding cases. The same objection was taken in the case of *The Octavia*; (*c*) and it was contended, that the word *including*, in the 9th section of the Judiciary Act, ought not to be construed cumu-

(*b*) 2 Cranch, 406.
(*a*) 4 Cranch, 443.
(*b*) 1 Wheaton, 9.
(*c*) 1 Wheaton, 20.

latively; and that a suit might be a cause of admiralty and maritime jurisdiction, and yet triable under the common law, proceeding * by information, instead of the civil law process * 375 by libel. The objection was again overruled. The last case that brought up the same point for review and discussion was *The Sarah;* (*a*) and the Supreme Court there recognized the marked and settled distinction between the common-law and the admiralty jurisdictions of the district courts. In seizures made on land, the District Court proceeds as a court of common law, according to the course of the English Exchequer, on information *in rem*, and the trial of issues of fact is to be by jury. (*b*) But in cases of seizures on waters navigable from the sea, by vessels of ten or more tons burden, the court proceeds as an instance court of admiralty, by libel *in rem*, and the trial is by the court.

It may now be considered as the settled law of this country, that all seizures under laws of impost, navigation, and trade, if made upon tide waters navigable from the sea, are civil cases of admiralty jurisdiction; and the successive judgments of the Supreme Court, upon this point, are founded upon the Judiciary Act of 1789. If the act of Congress declares them to be cases of admiralty jurisdiction, it is apprehended that this is an extension of admiralty powers beyond the English practice. Cases of forfeiture for breaches of revenue law are cognizable in England in the Exchequer upon information, though the seizure was made upon navigable waters, and they proceed there to try the fact on which the forfeiture arises, by jury. (*c*) Informations are filed in the Court of Exchequer for forfeiture, upon seizure of property, for breach of laws of revenue, impost, navigation, and trade. In the case of *The Attorney-General* v. *Jackson*, (*d*) the seizure was of a vessel lying in port at Cowes, for breach of the act of navigation, and the proceeding was by information and trial by jury, according to the course of the common law. Lord Hale said, (*e*) that informations of that * nature lay exclusively in the * 376 Exchequer. Congress had a right, in their discretion, to

(*a*) 8 Wheaton, 391.

(*b*) Thompson J., 1 Paine C. C. 504; United States *v.* Fourteen Packages, Gilpin, 235.

(*c*) Attorney-General *v.* Le Merchant, 1 Anst. 52.

(*d*) Bunb. 236.

(*e*) Harg. L. T. 227.

make all such seizures and forfeitures cognizable in the district courts; but it may be a question, whether they had any right to declare them to be cases of admiralty jurisdiction, if they were not so by the law of the land when the constitution was made. The constitution secures to the citizen trial by jury, in all criminal prosecutions, and in all civil suits at common law, where the value in controversy exceeds twenty dollars. These prosecutions for forfeitures of large and valuable portions of property, under revenue and navigation laws, are highly penal in their consequences; and the government and its officers are always parties, and deeply concerned in the conviction and forfeiture. And if, by act of Congress, or by judicial decisions, the prosecution can be turned over to the admiralty side of the District Court, as being neither a criminal prosecution nor a suit at common law, the trial of the cause is then transferred from a jury of the country to the breast of a single judge. It is probable, however, that the Judiciary Act of 1789 did not intend to do more than declare the jurisdiction of the district courts over these cases; and that all prosecutions for penalties and forfeitures, upon seizures under laws of impost, navigation, and trade, were not to be considered of admiralty jurisdiction, when the case admitted of a prosecution at common law; for the act saves to "suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it."[1] We have seen that it is competent to give it, because, under the vigorous system of the English law, such prosecutions *in rem* are in the Exchequer, according to the course of the common law; and it may be doubted whether the case of the *La Vengeance*, on which all the subsequent decisions of the Supreme Court have rested, was sufficiently considered. There is, however, much colonial precedent for this extension of admiralty jurisdiction. The vice-admiralty courts, in this country, when we were colonies, and also in the West Indies, obtained jurisdiction in revenue causes to
* 377 an extent * totally unknown to the jurisdiction of the English admiralty, and with powers quite as enlarged as those claimed at the present day. (*a*) But this extension, by statute, of

(*a*) See the form of the commissions of these vice-admiralty courts under the colonial establishments, in a note to the case of De Lovio *v.* Boit, 2 Gallison, 470, and in Du Ponceau on Jurisdiction, p. 158.

[1] As to the construction of the last-mentioned clause of the constitution, see *ante*, (p. 369,) *note* (1).

the jurisdiction of the American vice-admiralty courts beyond their ancient limits, to revenue cases and penalties, was much discussed and complained of on the part of this country, at the commencement of the Revolution. (*b*)

Whatever admiralty and maritime jurisdiction the district courts possess would seem to be *exclusive*, for the constitution declares that the judicial power of the United States shall extend to *all cases* of admiralty and maritime jurisdiction; and the act of Congress of 1789 says, that the district courts shall have *exclusive* original cognizance of all civil causes of admiralty and maritime jurisdiction. (*c*) It is certain, however, that the state courts take

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(*b*) Journals of Congress, vol. i. pp. 22, 29, 39. Journals of the Assembly of the Colony of New York, vol. ii. pp. 795, 797, 800. In England, as Judge Conkling observes, all revenue seizures are cognizable exclusively in the Court of Exchequer; and such of them as are cognizable on the admiralty side of the district courts of the United States, are made so only by force of a legislative act. The effect of the statute as to such seizures embraced by it, is to withdraw them from the consideration of a jury, according to the course of the civil law. Conkling's Treatise, 2d. edit. p. 391.

(*c*) Constitution, art. 3. sec. 2. Act of Congress of September 24th, 1789, c. 20, sec. 9. *Vide supra*, pp. 304, 372. Mr. Justice Story (3 Comm. Const. U. S. p. 533, note) says, that the opinion here expressed is "founded in mistake," and that the admiralty and maritime jurisdiction was intended by the constitution to be exactly as extensive or exclusive, and no more so, in the national judiciary, than it "existed in the jurisprudence of the common law"; and that where the cognizance of admiralty and maritime cases "was previously concurrent in the courts of common law," it remained so. If I was mistaken as to the meaning of the constitution, in supposing that the judicial power, extending "to all cases of admiralty and maritime jurisdiction," was exclusive, I was led into the error by following the construction assumed by the Supreme Court of the United States, in the judgment delivered in Martin *v.* Hunter's Lessee, 1 Wheaton, 304. In that case, the court observed, that the words "the judicial power *shall extend*," &c., were imperative, and that Congress could not vest any portion of the judicial power of the United States, except in courts ordained and established by itself. It was their duty to vest the *whole judicial power* in their own courts. The learned judge who delivered the opinion of the court, noted and dwelt on the distinction in the language of the constitution, between declaring that the judicial power *shall extend to all cases* in law and equity arising under the constitution, — to *all cases* affecting ambassadors, &c., — to ALL CASES of admiralty and maritime jurisdiction, — and then (dropping *ex industria* the word *all*) to controversies to which the United States shall be a party, — to controversies between, &c., &c. The difference of phraseology, he said, was not accidental, but designed, and the jurisdiction in the one case was *imperative*, and in the other might be qualified; and that, upon any construction, the judicial power of the United States was in some cases unavoidably exclusive, and *in all others might be made so*, at the election of Congress. Upon this ground I was led to the view I took in the text, that as the admiralty and maritime jurisdiction, within the purview of the constitution, was *exclusive*, it ought not to extend further than the *settled* admiralty and maritime jurisdiction when the consti-

an extensive and unquestionable cognizance of maritime contracts, and on the ground that they are not cases, strictly and technically speaking, of admiralty and maritime jurisdiction. If, however, the claim of the district courts be well founded to the cognizance of all maritime contracts, wheresoever the same may be made, or whatever may be the form of the contract, it would seem that the jurisdiction of the state courts over those contracts could not be sustained. But I apprehend it may fairly be doubted, whether the constitution of the United States meant by admiralty and maritime jurisdiction, anything more than that jurisdiction which was settled and in practice in this country under the English jurisprudence, when the constitution was made;[1] and whether it had any retrospective or historical reference to the usages and practice of the admiralty, as it once existed in the middle ages, before
*378 its territories * had been invaded and partly subdued by the bold and free spirit of the courts of common law, armed with the protecting genius and masculine vigor of trial by jury.

Jurisdiction of the instance courts.

(4.) *Jurisdiction of the instance courts.*

The extensive and superior claims of the American courts of admiralty, as courts of civil maritime jurisdiction, we have had occasion already to consider; but, according to the English jurisprudence, the instance court takes cognizance only of things done, and contracts not under seal made *super altum mare*, and without the body of any county. This, of course, excludes all creeks, bays, and rivers, which are within the body of some county; and if the place be the sea-coast, then the ebbing and flowing of the tide determines the admiralty. The cause must arise *wholly* upon the sea, and not within the precincts of any county, to give the admiralty jurisdiction. If the action be founded on a matter done partly on land and partly on water, as if a contract be made on land to be executed at sea, or be made at

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tution was formed. It appeared to me, therefore, upon a reconsideration of the subject, that the elaborate decision in De Lovio *v.* Boit grasped at too much jurisdiction. But we are taught by the note in the Commentaries referred to, that the state courts have all the concurrent cognizance which they had originally, in 1787, over maritime contracts, and that this concurrent jurisdiction does not depend, as declared in 1 Wheaton, 337, on the pleasure of Congress, but is founded on the "reasonable interpretation of the constitution."

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[1] A more enlarged jurisdiction appears to be now established. See *ante*, p. [369,] note (1).

sea to be executed on land, the common law has the preference, and excludes the admiralty. (*a*) The admiralty has cognizance of maritime hypothecations of vessels and goods in foreign ports, for repairs done, or necessary supplies furnished; (*b*) and in the case of *Menetone* v. *Gibbons*, (*c*) it was admitted by the K. B. that the admiralty had entire jurisdiction in the case of an hypothecation bond, charging a ship with money taken up in a foreign port for necessaries, though the bond was under seal, and executed on land. The jurisdiction, in such a case, depended on the subject-matter,

(*a*) Com. Dig. tit. Adm. E. 1, 7, 10, 12, F. 1, 2, 4, 5. 3 Blacks. Comm. 106, 107. In cases purely dependent upon the *locality* of the act done, the admiralty jurisdiction is limited to the sea and to tide water as far as the tide flows, and does not reach beyond high-water mark. But in *mixed cases*, as where salvage services are performed partly on tide waters and partly on shore, for the preservation of the property, the admiralty has jurisdiction. United States *v.* Coombs, 12 Peters U. S. 72. In Peyroux *v.* Howard, 7 Peters U. S. 324, the Supreme Court decided, that New Orleans was within the ebb and flow of the tide, and that admiralty jurisdiction prevailed there, and that repairs done there by a shipwright upon a steamboat were essentially a maritime service, and gave a lien, notwithstanding the commencement or termination of the voyage of the steamboat might be at some place up the Mississippi, beyond the reach of the tide. It was held, in Smith *v.* The Pekin, Gilpin, 203, that a contract for wages on a voyage between ports of adjoining states, and on the tide waters of a river or bay, is within the jurisdiction of the district courts, and may be enforced by a suit *in rem* in the admiralty. But if a vessel be engaged substantially in interior navigation and trade, not on tide waters, the admiralty has no jurisdiction, though she may have touched at one *terminus* of the voyage on tide waters. The Steamboat Orleans *v.* Phœbus, 11 Peters U. S. 175. *The principle which seems to be established is that admiralty jurisdiction extends to all maritime causes and services, to be substantially performed on tide waters.* See pp. 364, 367, 369, 370, 371, 378, 379, of this volume. The act of Congress, 26th February, 1845, (5 Statutes at Large, 726,) conferring upon the district courts the same admiralty jurisdiction in matters of contract and tort, concerning vessels of twenty tons burden, enrolled and licensed for the coasting trade, and, at the time employed in navigation between different states and territories, as these courts, at that time possessed, in respect to such vessels engaged in commerce on the high seas, was held to be constitutional, in the case of The Propeller Genesee Chief *v.* Fitzhugh, 12 How. U. S. 443. The lakes and their connecting waters are within the scope of the admiralty jurisdiction. Fretz *v.* Bull, Id. 466.[1]

(*b*) Johnson *v.* Shippen, 1 Salk. Rep. 34; Lord Raym. 982, S. C. It seems to be, also, not only the better opinion, but the settled law, that the admiralty has jurisdiction *in rem* in the case of bottomry bonds creating a lien on a vessel, whether the bond was executed by the owner in a foreign or in a *home* port. Whenever the local law gives a lien on the vessel as a security, or there is an express hypothecation, the admiralty has jurisdiction *in rem* to enforce it. Corish *v.* The Murphy, 2 Bro. Civ. & Adm. Law, 530, App. The Sloop Mary, 1 Paine C. C. 671; The Brig Draco, 2 Sumner, 157.

(*c*) 3 Term Rep. 267.

[1] *Vide* Jackson *v.* Magnolia, 20 How. U. S. 291.

for the contract was merely *in rem*, and there was no personal covenant for the payment of the money, and the admiralty jurisdiction in such a case was indispensable, as the courts of
* 379 common law * do not proceed *in rem*. (*a*) If the admiralty has cognizance of the principal thing, it has also of the incident, though that incident would not, of itself, and if it stood for a principal thing, be within the admiralty jurisdiction. Upon this principle it is, that goods taken by pirates, and sold on land, may be recovered from the vendee, by suit in the admiralty. (*b*) [1] Suits for seamen's wages are cognizable in the admiralty, though the contract be made upon land, provided it be not a contract under seal; and this is intended for the ease and benefit of seamen, for they are all allowed to join in the suit, and all the persons on board below the rank of the master are comprehended in the description of mariners. (*c*) This case of seamen's wages the courts

(*a*) In the case of The Atlas, 2 Hagg. Adm. 48 - 73, it was admitted, that the Court of Admiralty had an undoubted jurisdiction over bottomry bonds founded upon sea risks, and defeasible by the destruction of the ship in the course of the voyage. It was an original jurisdiction exercised upon the ground of authorized usage and established authority. But the jurisdiction would not attach upon any bond not dependent upon the accidents of the voyage.

(*b*) Com. Dig. tit. Adm. F. 6; 3 Blacks. Com. 108. The Court of Admiralty has authority to entertain a civil suit, entitled *causa spolii civilis et maritima*, for the restitution of goods piratically taken on the high seas. The Hercules, 2 Dod. Adm. 369.

(*c*) 1 Salk. 34; Str. 761, 937; 1 Lord Raym. 398; 3 Lev. 60; 4 Inst. 134, 142; Com. Dig. tit. Adm. E. 15; 2 Lord Raym. 1044, 1206. A contract for wages on board a steamboat plying between ports of adjoining states, on a *navigable tide water*, may be enforced by a suit *in rem* in the admiralty. Wilson *v.* the Steamboat Ohio, Gilpin's R. 505. But to render a service on board a vessel even on tide waters *maritime*, so far as to give admiralty jurisdiction over it as for wages, it must contribute to the preservation of the vessel, or of those whose labor and skill are employed to navigate her. Musicians do not come within that description. Trainer *v.* The Superior, Gilpin, 514. The service must be essentially maritime; labor on board a fuel or coal boat is not of that description. Thackarey *v.* The Farmer, Ibid. 524. The service must concern transactions and proceedings relative to commerce and navigation, and to damages and injuries upon the sea. Nor has the admiralty any jurisdiction in matters of account between part owners. The Steamboat Orleans *v.* Phœbus, 11 Peters U. S. 175. It is limited in matters of contract to those which are *maritime*. Ibid.[2] Thus, in the case of The Thomas Jefferson, 10 Wheaton, 428, it

[1] Davison *v.* Seal Skins, 2 Paine C. C. 324.

[2] Minturn *v.* Maynard, 17 How. U. S. 477; Kellum *v.* Emerson, 2 Curtis C. C. 79. The Court of Admiralty will take an account when it is necessary or incident to the exercise of its jurisdiction; but it will not entertain suits either *in rem* or *in personam* which invoke its authority for the sole purpose of compelling an accounting. The Fairplay, [Bl. & Howl.] 136. Duryee *v.* Elkins, 1 Abbott Adm. 529.

of common law admit to be of admiralty jurisdiction; and this is an exception in favor of seamen, to the general rule that the admiralty has no jurisdiction of any matter arising on land, though it be of a maritime nature, as a charter-party or policy of insurance. The district court, as a court of admiralty, possesses a general jurisdiction in suits by seamen and salvors, and by material men, *in rem* and *in personam*. The courts of admiralty have a general jurisdiction to enforce maritime liens, by process *in rem*, and there may be a maritime jurisdiction *in personam*, where there is no lien, and consequently no jurisdiction *in rem*. Seamen have an implied lien on the vessel for services rendered upon the high seas or upon tide waters. They may proceed *in rem* and *in personam;* but the proceeding *in rem* is only maintainable by material men when there is a specific lien, or for wages or for repairs made, or necessaries furnished to a foreign ship, or to a ship in the ports of the state to which she does not belong. (*d*)[3] The

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was held, that the admiralty had no jurisdiction over contracts for the hire of seamen, unless the service was substantially performed upon the sea, or upon waters within the ebb and flow of the tide. Suits for seamen's wages on a voyage from a place in Kentucky, up the river Missouri and back again, were, therefore, not of admiralty and maritime jurisdiction. But state courts under state laws have jurisdiction *in rem* in cases of supplies and repairs to boats or vessels on river navigation in the interior, as well as under contracts for the carriage of persons or property upon navigable river waters. Statutes of Missouri, 1835, p. 102. The district courts, as instance courts of admiralty, have cognizance of all claims for salvage in cases of shipwreck, and of vessels derelict at sea. This is well settled by the American cases. See Conkling's Treatise, 2d edit. 156.

(*d*) The Hope, 3 Rob. Adm. 215; The Trelawney, 3 Rob. Adm. 216, note. The General Smith, 4 Wheaton, 438; The Jerusalem, 2 Gallison, 345; The Robert Fulton, 1 Paine C. C. 620; Drinkwater *v.* Brig Spartan, Ware, 149; Sheppard *v.* Taylor, 5 Peters U. S. 675; Story J., in the case of the Brig Nestor, 1 Sumner, 74; Conkling's Treatise, 2d edit. 155; The Schooner Marion, 1 Story C. C. 68. See, also, *infra*, vol. iii. 167–170. If materials for a vessel be furnished in a home port, and a note of hand given by the owner, a libel in the admiralty *in personam* will not lie. Ramsay *v.* Allegre, 12 Wheaton, 611. In this last case the extent of admiralty jurisdiction *in personam* was much discussed and questioned by Mr. Justice Johnson. But in Willard *v.* Dorr, 3 Mason, 93, and in Hammond *v.* Essex F. & M. Ins. Co. 4 Mason, 196, Mr. Justice Story considered it to be settled jurisdiction of the admiralty, that the master could sue there *in personam* for his wages, and the seamen *in rem* as well as *in personam* for their wages. This appears to be a well-established distinction.

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[3] As to a "specific lien," see *ante*, p. [369,] note (1.) Cutler *v.* Rea, 7 How. U. S. 729. A state statute, which allows material men to proceed either against the owners of domestic vessels or *against the vessels themselves*, does not of itself create a lien *in rem*. Wick *v.* The Samuel Strong, 6 McLean, 587.

*380 admiralty jurisdiction is essential *in all such cases, for the process of a court of common law cannot directly reach the thing *in specie*. If the law raises a lien for a maritime service, a court of admiralty has power to carry it into effect. (*a*) The act of Congress of July 20th, 1790, relative to seamen, sec. 6, has given a specific and summary relief for seamen in the recovery of wages, by authorizing the district judge, or, in his absence, a magistrate, to summon the master before him, and to attach the vessel as security for the wages. (*b*)

We have now finished a general survey of the admiralty jurisdiction of the district courts in civil and criminal cases, and both as an instance and a prize court. It would not be consistent with the plan of these elementary disquisitions, to give a detailed sketch of the course of proceeding, and of the peculiar practice in the admiralty courts. The proceedings are according to the course of the civil law, and are remarkable for their comprehensive brevity, celerity, and simplicity. Nothing can be more unlike, in its process, pleadings, proof, trial, and remedy, than the practice of the courts of admiralty and of the courts of common law. (*c*)

(*a*) Phillips *v.* Scattergood, Gilpin, 1. No prior replevin or attachment of the property under any state court process can control the paramount jurisdiction of the admiralty *in rem*, for freight or seamen's wages, or on a bottomry bond. Certain Logs of Mahogany, 2 Sumner, 589. A person hired for service as one of the crew on board of a canal-boat, under a coasting license, in the coal trade from the tide waters of the river Delaware, through the Raritan canal, to the tide waters in the harbor of New York, performs service of a maritime character, and has a lien on the vessel for his wages, and may proceed *in rem* for the same. Weizer *v.* Coal Boat D. C. Salisbury, D. C. U. S. New York, November, 1844.

(*b*) See vol. iii. 169 – 171, as to the lien of material men. Ibid. as to the remedy for seamen's wages. Material men and workmen, having liens on vessels *under state laws*, may enforce them in the District Court as well as in a state court, at their election, as the jurisdiction is in that case concurrent. Davis *v.* A New Brig, Gilpin, 473. In the case of Heyer *v.* The Schooner Wave, in the District Court of the Southern District of New York, 2 Paine, 131, the plaintiffs, as branch or deputy pilots, libelled the vessel for salvage, in relieving her in distress within the harbor of New York, and salvage was allowed. On appeal to the Circuit Court of the United States for the Southern District of New York, the decree was reversed, on the ground that the act of Congress of August 7, 1789, c. 9, had adopted the pilotage laws of the states respectively, temporarily, and had not since interfered, and that the remedy for the pilots was in the state courts, and that the District Court had no jurisdiction in the case of pilotage arising within the waters of the states, until Congress should give it, as they had the right to do. See *infra*, vol. iii. p. 176, note.

(*c*) The act of Congress of May 8th, 1792, c. 36, sec. 2, declared that the form of writs, executions, and other process, except their style, in suits of admiralty and maritime jurisdiction, should be according to the principles, rules, and usages which belong

*(5.) The jurisdiction of the District Court, when proceeding as a court of common law, extends to all minor crimes and offences cognizable under the authority of the United States, and which are not strictly of admiralty cognizance; and to all seizures on land, and on waters not navigable from the sea; and to all suits for penalties and forfeitures there incurred; and to all suits by aliens, for torts done in violation of the law of nations, or of a treaty; and to suits against consuls and vice-consuls; and to all suits at common law, where the United States sue, and the matter in dispute amounts to one hundred dollars. (*a*) It has jurisdiction, likewise, of proceedings to repeal patents obtained surreptitiously, or upon false suggestions. This was given by the act of Congress of February 21st, 1793, chap. ii., and it is a jurisdiction that leads frequently to the most intricate, nice, and perplexed investigations, respecting the originality of inventions and improvements in complicated machinery. (*b*) It was made a question in the District Court of New York, in the case *Ex parte Wood*, whether the process to be *381

Civil jurisdiction of the district courts.

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to courts of admiralty, as contradistinguished from courts of common law, subject to alterations and additions by the said courts, and to regulations to be prescribed by the Supreme Court. For a knowledge of the admiralty practice, I would refer the student to Clerke's Practice of the Court of Admiralty in England which is a work of undoubted credit; and in 1809, a new edition was published in this country by Mr. Hall, with an appendix of precedents. I would also refer him to the 2d volume of Brown's Civil and Admiralty Law, and to the appendix to the 1st and 2d volumes of Mr. Wheaton's Reports, where he will find the practice of the instance and prize courts digested and summarily explained. See, also, the Treatise of Dr. Dunlap, on Admiralty practice. He was formerly attorney of the United States for Massachusetts; and his work is pronounced, by the most competent judges, to be learned, accurate, and well-digested. See, also, the case of Lane *v.* Townsend, in the District Court of Maine, in 1835, Ware, 287, in which the learned judge defines the nature and effect of stipulations in the admiralty. That case contains a learned examination of the mode of commencing a suit, and of the prætorian stipulations required of the defendant in the Roman law, and it satisfactorily shows great inaccuracy in Brown's view of the subjects of the stipulations, cautions, or securities required in the progress of the suit by the practice of the Roman forum. In the case, also, of Hutson *v.* Jordan, Ware, 385, 395, the admiralty practice, as derived from the Roman law and the civil law courts, is discussed with the customary learning and ability of the distinguished judge. So, also, the practice on the joinder of different actions of different natures in one libel. Ibid. 427. See, in 3 N. Y. Legal Observer, 357, and in the Law Reporter for March, 1846, the rules of practice in the courts of the United States, in causes of admiralty and maritime jurisdiction on the instance side of the court, established in pursuance of the act of Congress of 23d August, 1842, c. 188.

(*a*) Judiciary Act of September, 1789, sec. 9.

(*b*) See vol. ii. p. 368.

awarded to repeal the patent was not in the nature of a *scire facias* at common law, upon which issue of fact might be taken and tried by a jury. The district judge decided, that the proceeding was summary, upon a rule to show cause, and that no process of *scire facias* was afterwards admissible. But upon appeal to the Supreme Court of the United States, (*c*) the decree of the District Court was reversed, and the District Court was directed by *mandamus* to enter upon record the proceedings in the cause antecedent to the granting of the rule to show cause why process should not issue to repeal the patent. The District Court was further directed to award process, in the nature of a *scire facias*, to the patentee, to show cause why the patent should not be repealed; and upon the return of the process, the court was to proceed to try the cause upon the pleadings of the parties, and the issue of law or fact joined thereon, as the case might be; and that if the issue be an issue of fact, the trial thereof was to be by jury, according to the course of the common law.

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This was a just and liberal decision of the Supreme Court; and it was observed, in the opinion which was pronounced, that it was not lightly to be presumed, that Congress, in this class of patent cases, placed peculiarly within their patronage and protection, involving some of the dearest and most valuable rights which society acknowledges, and the constitution itself meant to favor, would institute a new and summary process, which should finally adjudge upon those rights without a trial by jury, without a right of appeal, and without any of those guards with which, in equity suits, it has fenced round the general administration of justice. The Supreme Court then went into an analytical examination of the 10th section of the act of 1793, on which the claim of summary jurisdiction rested, and vindicated the construction which they assumed, in opposition to that taken by the District Court.

The jurisdiction of the judges of the district courts, in cases of bankruptcy, has presented for consideration some important questions on the point of jurisdiction. We have no bankrupt system in existence under the government of the United States; but there may be some lingering traces of business yet arising and undetermined, under the Bankrupt Act of the year 1800, and

(*c*) 9 Wheaton, 603.

many questions may be expected to arise under the Bankrupt Act of 1841, which has been recently repealed. (*a*) In the case of *Comfort Sands*, (*b*) in the District Court of New York, it was observed, that in England, the sole power of directing the execution, and controlling the administration of the bankrupt system, in all its departments, * and in every stage of the * 383 proceeding, resided in the lord-chancellor.

This jurisdiction of the English chancellor is not in the Court of Chancery, but in the individual who holds the great seal; and it is exercised summarily upon petition, and his judgment upon the petition is without appeal, unless the chancellor, in his discretion, allows a bill to be filed, in order to found an appeal thereon. The judge then proceeded to examine the several provisions of the Bankrupt Act of the United States of 1800, in order to show, that upon the principles of construction adopted in England, the district judge had the same jurisdiction in cases of bankruptcy as is exercised by the lord-chancellor. The same course of reasoning which sustains the jurisdiction of the one would confer that of the other. He insisted that the jurisdiction was given, not to the District Court, but to the individual who happened to hold the office of district judge, and that, consequently, all his decisions in bankruptcy were without appeal, for appeals lie only from the appeals of the District Court. But that extraordinary doctrine has since been overruled; and it has been held, (*a*) that the circuit courts of the United States had jurisdiction of matters arising under the bankrupt law, and the district courts had not exclusive jurisdiction over the entire execution of such laws. They could not remove the assignees, nor compel them to account. An appeal lay in proceedings under the Bankrupt Act from the district to the circuit courts, and the state courts had a concurrent jurisdiction in matters of account between the bankrupt and his creditors, and which has been freely and extensively exercised. (*b*)

(*a*) See *infra*, vol. ii. 391.

(*b*) United States Law Journal, vol. i. p. 15.

(*a*) Lucas *v.* Morris, 1 Paine C. C. 396.

(*b*) See the case of Sands *v.* Codwise, 4 Johns. In the case Ex parte Christy, 3 How. U. S. 292, it was held that the *Supreme Court* had no revising power over the decrees of the District Court sitting in *bankruptcy*, under the act of 1841; but it had over proceedings as a court of admiralty and maritime jurisdiction. The District Court, when sitting in bankruptcy, has plenary power over liens and mortgages on the bankrupt's property, and summarily to decide on their validity and extent, and may oper-

Territories belonging to the United States.

(6.) *Of the territorial court of the United States.*

With respect to the vast territories belonging to the United States, Congress have assumed to exercise over *384 *them supreme powers of sovereignty. Exclusive and unlimited power of legislation is given to Congress by the constitution, and sanctioned by judicial decisions. (*a*) Congress was, by the constitution, (*b*) clothed with authority "to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as might, by cession of particular states and the acceptance of Congress, become the seat of government of the United States." The District of Columbia was created for that purpose, under cessions from the states of Maryland and Virginia. The territorial jurisdiction of that district, known as the District of Columbia, and which embraces the city of Washington, and throws its municipal protection over all the officers and agents of the government of the United States, is extremely important. (*c*) The general sovereignty existing in the

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ate upon the parties in the state courts by injunction, and in that way control the proceedings in the state courts. S. C. But in the case of Peck *v.* Jenness, Sup. Court of New Hampshire, July, 1845, it was adjudged that the Bankrupt Act of 1841 neither limited nor enlarged the jurisdiction of the state courts, and that creditors of a bankrupt may pursue their remedies in the state courts, notwithstanding their claims are debts capable of being asserted under the bankruptcy, and that mortgages and liens saved by the Bankrupt Act may be enforced in the state courts, and that the district courts cannot interfere with or control the exercise of it. See *supra*, 247, and *infra*, 411. On the other hand, in Lewis *v.* Fisk, 6 Rob. (Louis.) 159, it was held that a decree of bankruptcy, under the act of 1841, devested all jurisdiction in the state courts, and they had no authority to decide questions involving the adjustment of privileges and liens among the creditors of the bankrupt, or the distribution of the funds of the estate. All the estate of the bankrupt is, by the decree of bankruptcy, *ipso facto* vested in the assignee.

(*a*) Const. art. 4, sec. 3; American Ins. Co. *v.* Canter, 1 Peters U. S. 511. See, also, *supra*, p. 258.

(*b*) Art. 1, sec. 8.

(*c*) The powers of the Judiciary of the District of Columbia were ably discussed and declared by Ch. J. Cranch, in the Circuit Court of that district, on the 6th of June, 1837, in the case of The United States, *ex. relat.* Stokes, Stockton, and Moore *v.* Amos Kendall, Postmaster-General of the United States, 5 Cranch C. C. 171. It was decided, that the court had authority to issue a *mandamus* to compel the defendant to credit the relators with the amount of an award made by the Solicitor of the Treasury in their favor, under an act of Congress of July 2d, 1836. The defendant had refused to appear under a citation in that cause, and claimed exemption from all personal responsibility, as one of the heads of the departments, to the jurisdiction of the Court. The Chief Justice held that the Circuit Court of the district had all the jurisdiction that any Circuit Court of the United States could have, under the acts

government of the United States over its territories is founded on the constitution, which declared (*d*) that Congress "should have power to dispose of and make all needful rules and regulations respecting the territories, or other property belonging to the United States." (*e*) In the territories northwest of the river Ohio, and as

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of Congress of 13th February, 1801, sec. 11, and of the 27th February, 1801, c. 15, sec. 5, and it had more, — it was inferior only to the Supreme Court. It had power to call before it any person found in the district, from the highest to the lowest. No officer of government in the district was too high to be reached by the process of the court. The defendant in the case could not shelter himself under the authority or command of the President. There is no law establishing a relation between the Postmaster-General and the President, or any authority in the latter to prescribe his duties, or control him in the exercise of his official functions. The Postmaster, in the exercise of his official duties, is as independent of the President as the President is of him. If the President has any power to control him, it is only through the fear of removal; and no act done under such a control would be justified. This decision was affirmed on appeal to the Supreme Court of the United States, in January term, 1838. Kendall *v.* The United States, 12 Peters U. S. 524.

(*d*) Art. 4, sec. 3.

(*e*) It was held, in the case of The Canal Company *v.* Railroad Company, 4 Gill & Johns. 1, by the Court of Appeals in Maryland, that Congress acted in the government of the District of Columbia and other districts, not as a local legislature, but as the legislature of the Union; and in the case of The State *v.* Orleans N. Company, 11 Martin's Rep. 38, 309, it was held, that the legislature of the Orleans *territory* could grant a charter binding on the future State of Louisiana. So, in the case of Williams *v.* The Bank of Michigan, 7 Wendell, 539, the New York Court of Errors adjudged, that the power to incorporate a bank was within the scope of the general powers of territorial legislation, conferred upon the Michigan territory by the act of Congress of January 11th, 1805. The government of the United States, which can lawfully acquire territory by conquest or treaty, must, as an inevitable consequence, possess the power to govern it. The territories must be under the dominion and jurisdiction of the Union, or be without any government; for the territories do not, when acquired, become entitled to self-government, and they are not subject to the jurisdiction of any state. They fall under the power given to Congress by the constitution. This was the doctrine and decision of the Supreme Court in the case of The American Ins. Company *v.* Canter, 1 Peters U. S. 511; and see, also, 3 Story's Com. 193 – 198, 536, n. 1. In a case submitted to the Supreme Judicial Court of Massachusetts, in 1841, (1 Metcalf, 580,) it was held, that in places ceded to the United States for navy yards, arsenals, &c., and where there is no other reservation of jurisdiction to the state than that of a right to serve civil and criminal process on such lands, the persons residing there were not entitled to the benefit of the common schools of the town, nor liable to any tax assessments, nor acquired any town settlement by a residence therein, nor any elective franchise, as inhabitants of the town.[1]

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[1] In respect to the district containing the site of the national government, the grant of power to Congress is "to exercise exclusive legislation in all cases." In respect to the territories the grant is "to make all needful rules and regulations concerning the territory and *other property* belonging to the United States." The nature of, and the

separate territories were successively formed, Congress adopted and applied the principles of the ordinance of the confederation Congress of the date of the 13th of July, 1787. That ordinance was framed upon sound and enlightened maxims of civil jurisprudence. The organized territories belonging to the United States, and governed under the superintendence of Congress, at present consists of the territory of Columbia. The territories of Michigan and Arkansas were admitted into the Union as states, and upon an equality with the other states, by acts of Congress of June 15th, 1836, and January 26th, 1837; and the territories of Iowa and Florida were admitted into the Union as states, and upon an equality with the other states, by acts of Congress of March 3d, 1845, c. 48, and of December 28th, 1846, c. 1; and the territory of Wisconsin was admitted into the Union, on like equality, by acts of Congress of August 6th, 1846, c. 89, and March 3d, 1847, c. 53; and the republic of Texas, by a joint resolution of Congress of March 1st, 1845, and of December 29th, 1845.

* 385 * It would seem, from these various congressional regulations of the territories belonging to the United States, that Congress have supreme power in the government of them, depending on the exercise of their sound discretion. That discretion has hitherto been exercised in wisdom and good faith, and with an anxious regard for the security of the rights and privileges of the inhabitants, as defined and declared in the ordinance of July, 1787, and in the constitution of the United States. "All admit," said Chief Justice Marshall, (*a*) "the constitutionality of a territorial government." But neither the District of Columbia, nor a

(*a*) 4 Wheaton, 422.

limitations upon, the sovereignty of the Union over the territories and the people thereof have become the subjects of angry and dangerous political discussion. In the celebrated case of *Dred Scott*, 19 How. U. S. 393, a majority of the Judges of the Supreme Court were of opinion that the last-mentioned clause of the constitution applies only to territory within the original states at the time the constitution was adopted, and that it did not apply to future territory acquired by treaty or conquest from foreign nations. They were also of opinion that the power of Congress over such future territorial acquisitions was not unlimited, that the citizens of the states migrating to a territory were not to be regarded as colonists subject to absolute power in Congress, but as citizens of the United States, with all the rights of citizenship guaranteed by the constitution, and that no legislation was constitutional which attempted to deprive a citizen of his property on his becoming a resident of a territory. The question arose under an act of Congress prohibiting slavery in the territory of Upper Louisiana, acquired from France.

territory, is *a state*, within the meaning of the constitution, or entitled to claim the privileges secured to the members of the Union. This has been so adjudged by the Supreme Court. (*b*) Nor will a writ of error or appeal lie from a territorial court to the Supreme Court, unless there be a special statute provision for the purpose. (*c*) If, therefore, the government of the United States should carry into execution the project of colonizing the great valley of the Columbia or Oregon River, to the west of the Rocky Mountains, it would afford a * subject of grave con- * 386
sideration, what would be the future civil and political destiny of that country. It would be a long time before it would be populous enough to be created into one or more independent states; and in the mean time, upon the doctrine taught by the acts of Congress, and even by the judicial decisions of the Supreme Court, the colonists would be in a state of the most complete subordination, and as dependent upon the will of Congress as the people of this country would have been upon the king and parliament of Great Britain, if they could have sustained their claim to bind us in all cases whatsoever. Such a state of absolute sovereignty on the one hand, and of absolute dependence on the other, is not congenial with the free and independent spirit of our native institutions; and the establishment of distant territorial governments, ruled according to will and pleasure, would have a very natural tendency, as all proconsular governments have had, to abuse and oppression. (*d*)

(*b*) Hepburn *v.* Ellzey, 2 Cranch, 445; Corporation of New Orleans *v.* Winter, 1 Wheaton, 91.

(*c*) Clarke *v.* Bazadone, 1 Cranch, 212; United States *v.* More, 3 Ibid. 159.

(*d*) Cicero in his Oration for the Manilian Law, c. 14, describes, in glowing colors, the oppressions and abuses committed by Roman magistrates, exercising civil and military power in the distant provinces.

LECTURE XVIII.

OF THE CONCURRENT JURISDICTION OF THE STATE GOVERNMENTS.

THE question, how far the state governments have concurrent powers, either legislative or judicial, over cases within the jurisdiction of the government of the United States, has been much discussed. It will be my endeavor, in the course of the present lecture, to ascertain the just doctrine and settled distinctions applicable to this great and important constitutional subject.

Concurrent legislation of the several states.

(1.) *As to the concurrent powers of legislation in the states.*

It was observed in The Federalist, (*a*) that the state governments would clearly retain all those rights of sovereignty which they had before the adoption of the constitution of the United States, and which were not by that constitution exclusively delegated to the Union. The alienation of state power or sovereignty would only exist in three cases: Where the constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the states from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the states would be absolutely and totally contradictory and repugnant.

In the judicial construction given from time to time to the constitution, there is no very essential variation from the
*388 * contemporary exposition which was here laid down by the high authority of The Federalist. Judge Chase, in the case of *Calder* v. *Bull*, (*a*) declared that the state legislatures retained all the powers of legislation which were not expressly taken away by the constitution of the United States; and he held, that no constructive powers could be exercised by the federal government. Subsequent judges have not expressed themselves quite so strongly in favor of state rights, and in restriction of the powers of the national government. In *Sturges* v. *Crowninshield*, (*b*) the

(*a*) No. 32. (*a*) 3 Dallas, 386. (*b*) 4 Wheaton, 193

Chief Justice of the United States observed, that the powers of the states remained, after the adoption of the constitution, what they were before, except so far as they had been abridged by that instrument. The mere grant of a power by Congress did not imply a prohibition on the states to exercise the same power. Thus, Congress are authorized to establish uniform laws on the subject of bankruptcy, but the states may pass bankrupt laws, provided there be no acts of Congress in force establishing a uniform law on that subject. (*c*) The states may legislate in the absence of congressional regulations. It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the states. It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the states. But the concurrent power of legislation in the states did not extend to every case in which the exercise of it by the states had not been expressly prohibited. The correct principle was, that whenever the terms in which the power was granted to Congress, or the nature of the *power, re- *389 quired that it should be exercised exclusively by Congress, the subject was as completely taken from the state legislatures, as if they had been expressly forbidden to act on it. In *Houston* v. *Moore*, (*a*) the same principles were laid down by Judge Washington, in delivering the opinion of the court. He observed, that the power of the state governments to legislate on the subject of the state militia, having existed prior to the formation of the constitution, and not being prohibited by that instrument, it remained with the states, subordinate, nevertheless, to the paramount power of the general government, operating upon the same subject. If Congress, for instance, did not exercise the power of providing for organizing, arming, and disciplining the militia, it was competent for the states to do it; but as Congress had exercised its constitutional powers upon the subject of the militia as fully as was thought proper, the power of legislation over that subject by the states was excluded, except so far as it had been permitted by Congress. The doctrine of the court was, that when Congress exercised their powers upon any given subject, the states could not enter upon

(*c*) In Golden *v.* Prince, 3 Wash. C. C. 313, Judge Washington had previously held, in the Circuit Court of the United States for Pennsylvania, that Congress had the exclusive power to pass bankrupt laws; but this opinion was subsequently corrected, and qualified according to the doctrine in the text.

(*a*) 5 Wheaton, 1.

the same ground, and provide for the same objects. The will of Congress may be discovered as well by what they have not declared, as by what they have expressed. Two distinct wills cannot at the same time be exercised, in relation to the same subject, effectually, and at the same time be compatible with each other. If they correspond in every respect, then the latter is idle and inoperative. If they differ, they must, in the nature of things, oppose each other so far as they do differ. It was, therefore, not a true and constitutional doctrine, that in cases where the state governments have a concurrent power of legislation with the national government, they may legislate upon any subject on which Congress have acted, provided the two laws are not in their operation contradictory and repugnant to each other.

*390 *Judge Story, in the opinion which he gave in this case, spoke to the same effect, and defined with precision the boundary line between the concurrent and residuary powers of the states, and the exclusive powers of the Union. A mere grant of power in affirmative terms to Congress did not *per se* transfer an exclusive sovereignty on such subjects. The powers granted to Congress were never exclusive of similar powers existing in the states, unless where the constitution has expressly in terms given an exclusive power to Congress, or the exercise of a like power was prohibited to the states, or there was a direct repugnancy or incompatibility in the exercise of it by the states. This is the same description of the nature of the powers as that given by The Federalist. An example of the first class is to be found in the exclusive legislation delegated to Congress over places purchased for forts, arsenals, &c.; and of the second class, in the prohibition of a state to coin money,[1] or emit bills of credit; and of the third class, in the power to establish a uniform rule of naturalization, and in the delegation of admiralty and maritime jurisdiction. In all other cases, the states retain concurrent authority with Congress, except where the laws of the states and of the Union are in direct and manifest collision on the same subject, and then those of the Union, being the supreme law of the land, are of paramount authority, and the state laws, so far, and so far only as such incompatibility exists, must necessarily yield.

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[1] It has been decided, that a law, passed by a state, for punishing the offence of circulating counterfeit coin of the United States, is within state authority and valid. The two offences of *counterfeiting the coin*, and *passing counterfeit money*, were considered to be essentially different. Fox *v.* The State of Ohio, 5 How. U. S. 410.

In the application of these general principles to the case before the court, it was observed, that the power given to Congress to provide for organizing, arming, and disciplining the militia, was not exclusive. It was merely an affirmative power, and, being not incompatible with the existence of a like power in the states, it might well leave a concurrent power in the latter. But when once Congress has acted on the subject, and carried this power into effect, its laws for the organization, arming, and disciplining the militia were supreme, and all interfering regulations of the states suspended. A state may organize, arm, and discipline *its own militia, in the absence of, or subordinate *391 to, the regulations of Congress. This power originally existed in the states, and the grant of it to Congress was not necessarily exclusive, unless a concurrent power in the states would be repugnant to the grant, and there was no such repugnancy in the nature of the power. But the question was, whether a state legislature had any concurrent power remaining after Congress had provided, in its discretion, for the case. The conclusion was, that when once the legislature of the Union has exercised its powers on a given subject, the state power over that same subject, which had before been concurrent, was, by that exercise, prohibited; and this was the opinion of the court.

These expositions of the paramount powers of the general government are to be received as correct and conclusive, for they proceed from the highest authority, and are exceedingly clear and logical in their deductions. The same doctrines had been previously declared in the Court of Errors of New York, in the steamboat case of *Livingston* v. *Van Ingen*. (*a*) "Our safe rule of construction and action," as it was there observed, (*b*) "was this, that if any given power was originally vested in this state, if it had not been exclusively ceded to Congress, or if the exercise of it had not been prohibited to the states, we might then go on in the exercise of the power until it came practically in collision with the exercise of some congressional power. When that happened to be the case, the state authority would so far be controlled, but it would still be good in those respects in which it did not contravene the provision of the paramount law." A similar exposition of the concurrent jurisdiction of the states was given by

(*a*) 9 Johns. 507. (*b*) 9 Johns. 576.

the Supreme Court of Pennsylvania, in *Moore* v. *Houston;* (*c*) and by the Chief Justice of Massachusetts, in *Blanchard* v. *Russell.* (*d*) [1]

When the constitution of the United States was under the consideration of the state conventions, there was much
* 392 * concern expressed on the subject of the general power of taxation over all objects of taxation, vested in the national government; and it was supposed that it would be in the power of Congress, in its discretion, to destroy in effect the con current power of taxation remaining in the states, and to deprive them of the means of supplying their own wants. All the resources of taxation might, by degrees, become the subjects of federal monopoly. The states must support themselves, by direct taxes, duties, and excises, and Congress may lay the same burden, at the same time, on the same subject. Suppose the national tax should be as great as the article, whether it be land, or distilled spirits, or pleasure-carriages, for instance, will conveniently and prosperously bear, and the state should be obliged to lay a further tax for its own necessities; the doctrine, as I understand it, is, that the claim of the United States would be preferred, and must be first satisfied, because the laws of the United States, made in pursuance of the constitution, are the supreme law of the land. The author of The Federalist (*a*) admits that a state might lay a tax on a particular article, equal to what it would well bear, but the United States would still have a right to lay a further tax on the same article; and that all collisions, in a struggle between the two governments for revenue, must and would be avoided by a sense of mutual forbearance. He nowhere, however, meets and removes the difficulty, in the case of a want of this mutual forbearance, where there is a concurrent tax laid on the same subject, which will not bear both taxes. He says only, that the United States would have no right to abolish the state tax. This is not contended; but would not the United States have a right to de-

(*c*) 3 Serg. & Rawle, 179. (*d*) 13 Mass. 16.
(*a*) No. 32. See, also, Nos. 31, 33, 34.

[1] An act of a state imposing tolls for improving the navigation of a river, unless it conflicts with the powers of Congress in actual exercise, is constitutional. And the establishment by act of Congress, of a port of delivery on the river, is not a conflicting exercise of power. Thames Bank *v.* Lovell, 18 Conn. 500; The United States *v.* The New Bedford Bridge, 1 Wood. & Minot, 401.

clare that their taxes were liens from the time they were imposed? and would they not, as of course, be entitled to be first paid? and must not the state collector, in all cases, stand by and wait until the national * tax is collected, before he proceeds to * 393 collect his state tax out of the exhausted subject? Upon the doctrine of the federal courts, and upon the doctrine of The Federalist himself, this must be the case; and though the state legislatures have a concurrent jurisdiction in the case of taxation, except as to imposts, yet, in effect, though not in terms, this concurrent power becomes a subordinate and dependent power. In every other case of legislation, the concurrent power in the state would seem to be a power entirely dependent, and subject to be taken away absolutely, whenever Congress shall choose to exercise their powers of legislation over the same subject. I do not mean to be understood to question the validity, or to excite alarm at the existence of this doctrine. The national government ought to be supreme within its constitutional limits, for it is intrusted with the paramount interests and general welfare of the whole nation. Our great and effective security consists in the fact, that the constituents of the general and of the state governments are one and the same people; and the powers of the national government must always be exercised with a due regard to the interest and prosperity of every member of the Union; for on the concurrence and good will of the parts, the stability of the whole depends. My object is to discover what this concurrent power of legislation amounts to, and what is its value, and on what constitutional foundation it is supported.

It was observed by Mr. Hamilton, in the convention of New York, in 1788, (*a*) that if the United States, and the state, should each lay a tax on a specific article, and the individual should be unable to pay both, the party who first levied would hold the property. But this position must be received with some qualification. The United States have * declared by law, * 394 that they were entitled, in respect to their debts, to priority of payment; and when it was said that this claim would interfere with the rights of the state sovereignties, and would defeat the measures they had a right to adopt, to secure themselves against delinquencies, the answer given in *Fisher* v. *Blight* (*a*) is, that "the

(*a*) Debates in the New York Convention, printed by Francis Childs, p. 113.
(*a*) 2 Cranch, 397.

mischief suggested, so far as it can really happen, was the necessary consequence of the supremacy of the laws of the United States, on all subjects to which the legislative power of Congress extends." It would seem, therefore, that the concurrent power of the legislation in the states is not an independent, but a subordinate and dependent power, liable, in many cases, to be extinguished, and in all cases to be postponed, to the paramount or supreme law of the Union, whenever the federal and the state regulations interfere with each other. (*b*)

(*b*) Mr. Hamilton, as Secretary of the Treasury, in his Report in January, 1790, on "a provision for the support of the public credit of the United States," recommended the assumption of the state debts, on the ground, among others, that if the states were left with the duty and burden of providing for the payment of the state debts contracted during the Revolutionary War, (and which were then estimated at twenty-five millions of dollars,) there might be a competition for resources, producing interfering regulations, collision, and confusion. Particular branches of industry might be oppressed by an accumulation of taxation upon them, in the exercise, at the same time, of the powers of the Union and of the states upon the same objects, and by different modes. The Secretary, though fully and deeply impressed with the embarrassment of the case, does not seem to question the authority of each government to lay taxes in its discretion, but assumes the policy and necessity of moderation and forbearance, when there should happen to be a pre-occupancy in the taxation of an article. It has become a settled point, and I think it was a very clear one from the beginning, that in the construction of the power of Congress, to lay and collect taxes, duties, imposts, and excises, it is not to be taken as an independent grant of power, without any defined limit or object, but that it is a power to be considered in connection with the words immediately thereafter, by which it is made subject to the qualification or limitation of being exercised *for the purpose* of "paying the debts, and providing for the common defence and general welfare of the United States." The purpose for which the taxes are to be laid is not of itself a distinct, substantial power, but a qualification of the power of taxation, by restricting it to those great and specified purposes, though the application of it to those purposes does undoubtedly admit, and necessarily requires the exercise of a large and undefined discretion. The progress of this question, and the very weighty opinions upon it, are fully shown and forcibly illustrated in 2 Story's Com. 367 – 398; and see particularly Mr. Monroe's Message on the bill respecting the Cumberland road, May 4th, 1822, Ibid. 445 – 456. That Congress possess the power to appropriate money raised by taxation or otherwise, *for other purposes*, in their discretion, than those pointed out in the enumerated powers, is a question that has given rise to very able and acute discussions; and the affirmative side of the question has been sustained and successfully vindicated by the practice of the government, and the weighty authority, among others, of Mr. Hamilton and Mr. Monroe, in celebrated documents under their official sanction. See Hamilton's Report on Manufactures, and President Monroe's Message above referred to. Story's Com. vol. ii. pp. 440 – 458. This distinguished commentator gives to the affirmative side of the question the sanction also of his decided opinion.[1]

[1] It has been decided, in a case most elaborately argued, that a state has a right to tax a resident citizen for his interest in ships, registered and licensed under the laws of the United States. Howell *v.* State of Maryland, 3 Gill, 14.

In *Wayman* v. *Southard*, (*c*) the question arose, how far the judicial process of the federal courts could be controlled by the laws of the several states. It was decided, that Congress had exclusive authority to regulate proceedings and executions in the federal courts, and that the states had no authority to control such process; and, therefore, executions by *fieri facias*, in the federal courts, were not subject to the checks created by the Kentucky statute, forbidding sales on execution of land for less than three fourths of its appraised value. It was, in that case, further observed, that the forms of execution, and other process, in the federal courts, in suits at common law, except modes of proceeding, were to be the same as used in September, 1789, in the supreme courts of the states, subject only to alterations and additions by Congress, and by the federal courts, but not to alterations since made in the state laws and practice. It was further observed, that the laws of the several states were, by the Judiciary Act of 1789, sec. 34, to be regarded as * rules of decision * 395 in trials at common law, in cases where they apply, unless the constitution, treaties, or statutes of the United States had otherwise provided. This, however, did not apply to the practice of the federal courts. As to that, the laws of the states were no rule of decision, and the direction was intended only as a legislative recognition of the principles of universal jurisprudence, as to the operation of the *lex loci*, in the trial and decision of causes. The law respecting final process was materially altered by the act of Congress of 1828, (*a*) and that act adopted into the national courts in each state respectively, (Louisiana excepted,) the existing laws and usages of the several courts, regulating the effect and operation of judgments and executions, and the proceedings for their enforcement; but where judgments were a lien in the state upon the property of the defendants, and the defendants were entitled to an imparlance thereon of one term or more, the defendants in the United States courts, in such state, are entitled to an imparlance of one term. If, in any state, there were no courts of equity with the ordinary equity jurisdiction, the courts of the United States, in such states, might prescribe the mode of executing their decrees in equity; and the courts of the United States were also

(*c*) 10 Wheaton, 1; U. S. Bank *v.* Halstead, 10 Id. 51, S. P.

(*a*) Act of Congress of May 19th, 1828, c. 68, sec. 2, 3.

invested with power to alter, in their discretion, the final process in their courts, and to conform the same to legislative changes made for the state courts.

Concurrent judicial jurisdiction of the states.

(2.) *As to the concurrent power of the states in matters of judicial cognizance.*

In the 82d number of The Federalist, it is laid down as a rule, that the state courts retained all pre-existing authorities, or the jurisdiction they had before the adoption of the constitution, except where it was taken away, either by an exclusive authority granted in express terms to the Union, or in a case where
* 396 a particular authority was granted to the * Union, and the exercise of a like authority was prohibited to the states, or in the case where an authority was granted to the Union, with which a similar authority in the states would be utterly incompatible. A concurrent jurisdiction in the state courts was admitted, in all except those enumerated cases; but this doctrine was only applicable to those descriptions of causes of which the state courts had previous cognizance, and it was not equally evident in relation to cases which grew out of the constitution. Congress, in the course of legislation, might commit the decision of causes arising upon their laws to the federal courts exclusively; but unless the state courts were expressly excluded by the acts of Congress, they would, of course, take concurrent cognizance of the causes to which those acts might give birth, subject to the exceptions which have been stated. In all cases of concurrent jurisdiction, an appeal would lie from the state courts to the Supreme Court of the United States; and without such right of appeal, the concurrent jurisdiction of the state courts, in matters of national concern, would be inadmissible; because, in that case, it would be inconsistent with the authority and efficiency of the general government.

Such were the early and speculative views of the ablest commentators on the constitution, in relation to the judicial powers of the state courts. We will now examine a series of decisions in the federal courts, defining and settling the boundaries of the judicial authorities of the states.

In the case of *Martin* v. *Hunter*, (*a*) Judge Story, in delivering the opinion of the court, seemed to think that it was the duty of

(*a*) 1 Wheaton, 304. See *supra*, p. 377.

Congress to vest the whole judicial power of the United States in courts ordained and established by itself. But the general observation was subsequently qualified and confined to that judicial power which was exclusively vested in the United States. The whole judicial power of the * United States should be, * 397 at all times, vested either in an original or appellate form, in some courts created under its authority. It was considered that there was vast weight in the argument, that the constitution is imperative upon Congress to vest all the judicial power of the United States, in the shape of original jurisdiction, in the supreme and inferior courts created under its own authority. At all events, it was manifest, that the judicial power of the United States is, unavoidably, in some cases, exclusive of all state authority, and, in all cases, may be made so, at the election of Congress. No part of the criminal jurisdiction of the United States can, consistently with the constitution, be delegated to state tribunals. The admiralty and maritime jurisdiction is of the same exclusive cognizance; and it can only be in those cases where, previous to the constitution, state tribunals possessed jurisdiction independent of national authority, that they can now constitutionally exercise a concurrent jurisdiction. Congress, throughout the Judiciary Act, and particularly in the 9th, 11th, and 13th sections, have legislated upon the supposition, that in all the cases to which the judicial powers of the United States extended, they might rightfully vest exclusive jurisdiction in their own courts.[1]

State courts may, in the exercise of their ordinary, original, and rightful jurisdiction, incidentally take cognizance of cases arising under the constitution, the laws, and treaties of the United States; yet to all these cases the judicial power of the United States extends, by means of its appellate jurisdiction. (*a*)

(*a*) In Wadleigh *v.* Veazie, 3 Sumner, 165, in the Circuit Court of the United States, in a writ of entry for land, the defendant pleaded in abatement an action in the state court between the same parties for the same land. It was held not to be a good plea, because the parties were reversed; but it was stated by the court, that in cases of concurrent jurisdiction in the state and federal courts, the latter court had no discretion to control the suit, in order to prevent a collision between the courts. It was

[1] In cases where property is seized under conflicting process of the federal and state courts, each process being regular and authorized but for the conflict with the other, priority in time is the test of supremacy in respect to the custody and disposition of the property. Taylor *v.* Caryl, 20 How. U. S. 583; Freeman *v.* Howe, 24 How. U. S. 450.

In *Houston* v. *Moore*, (*b*) the same question came again under the consideration of the Supreme Court; and Judge Washington, in delivering the opinion of the court, observed, that he saw nothing unreasonable or inconvenient in the doctrine of
* 398 The Federalist, on the subject of the concurrent * jurisdiction of the state courts, so long as the power of Congress to withdraw the whole or any part of those cases from the jurisdiction of the state courts be, as he thought it must be, admitted. The practice of the general government has been conformable to this doctrine; and, in the Judiciary Act of 1789, the exclusive and concurrent jurisdiction conferred on the courts by that act were clearly distinguished and marked. The act shows that, in the opinion of Congress, a grant of jurisdiction generally was not of itself sufficient to vest an exclusive jurisdiction. The Judiciary Act grants exclusive jurisdiction to the circuit courts of all crimes and offences cognizable under the authority of the United States, except where the laws of the United States should otherwise provide; and this accounts for the proviso in the act of 24th of February, 1807, c. 75, and in the act of 10th of April, 1816, c. 44, concerning the forgery of the notes of the Bank of the United States, declaring that nothing in that act contained should be construed to deprive the courts of the individual states of jurisdiction under the laws of the several states, over offences made punishable

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suggested that one or other of the courts, on a reconstruction of the constitution, ought to have exclusive jurisdiction; and in Wallace *v.* M'Connell, 13 Peters U. S. 136, it was held, that an attachment commenced and conducted to a conclusion, before the institution of a suit against the debtor in a federal court, is a defence to the suit. So an attachment pending in a state court, prior to the commencement of a suit in the Court of the United States, may be pleaded in abatement. The attaching creditor acquires a lien on the debt, good against the world. In Mabry & Giller *v.* Herndon, Ala. Sup. Court, (Law Reporter for October, 1846,) it was adjudged, in an able and clear argument by Collier Ch. J., that the state courts had cognizance concurrently with the federal courts, of cases of fraud in a bankrupt's discharge, under the act of Congress of 1841, as no act of Congress had expressly excluded such a cognizance. The power of impeaching a bankrupt's discharge for fraud rested upon the principles of the common law, as well as on the provisions of the act of 1841. So, in the case of Ward *v.* Mann, in the Supreme Judicial Court of Massachusetts, (the Law Reporter for March, 1847,) it was adjudged, after an able consideration of the case, that if a case be within the ordinary jurisdiction of a state court, the court may take cognizance of it, though the cause of action arises under rights acquired by a statute of the United States, provided there be no restriction under the constitution or the statute of the United States, confining the jurisdiction to the federal courts.

(*b*) 5 Wheaton, 1.

by that act. There is a similar proviso in the act of 21st of April, 1806, c. 49, concerning the counterfeiters of the current coin of the United States. Without these provisos, the state courts could not have exercised concurrent jurisdiction over those offences, consistently with the Judiciary Act of 1789. But these saving clauses restored the concurrent jurisdiction of the state courts, so far as, under the state's authority, it could be exercised by them. (*a*) There are many other acts of Congress which permit jurisdiction over the offences therein described, to be exercised by state magistrates and courts. This was necessary; because the concurrent jurisdiction of the state courts over all offences was taken away, and that jurisdiction was vested exclusively in the national courts by the Judiciary Act, and it required another act to restore it. The state courts could exercise no jurisdiction whatever over crimes and offences against * the United * 399
States, unless where, in particular cases, the laws had otherwise provided; and whenever such provision was made, the claim of exclusive jurisdiction in the particular cases was withdrawn, and the concurrent jurisdiction of the state courts, *eo instanti*, restored, not by way of grant from the national government, but by the removal of a disability before imposed upon the state tribunals.

In the case last referred to, the Supreme Court disclaimed the idea that Congress could authoritatively bestow judicial powers on state courts and magistrates. "It was held to be perfectly clear, that Congress cannot confer jurisdiction upon any courts but such as exist under the constitution and laws of the United States, although the state courts may exercise jurisdiction in cases authorized by the laws of the state, and not prohibited by the exclusive jurisdiction of the federal courts."

The Supreme Court, having thus declared the true foundation and extent of the concurrent jurisdiction of the state courts in

(*a*) In the case of The State *v.* Tutt, 2 Bailey (S. C.) 44, the state courts are considered as having jurisdiction, independent of the acts of Congress, to punish the uttering and passing counterfeit bank bills and coin of the United States, and on the principle that such a power is essential to the protection of the citizens. In the case of The Commonwealth *v.* Fuller, 8 Metcalf, 313, it was adjudged that the state courts had jurisdiction of the offence of possessing, with intent to pass, *scienter*, counterfeit gold or silver coin, current by law or usage within the state. The proviso in the acts of Congress of 1789, 1806, 1825, recognizes the concurrent jurisdiction of the states over such crimes.

criminal cases, proceeded to meet and solve a difficulty occurring on this subject of concurrent jurisdiction, whether the sentence of one jurisdiction would oust the jurisdiction of the other. The decision on this point was, that the sentence of either court, whether of conviction or acquittal, might be pleaded in bar of the prosecution before the other; as much so as the judgment of a state court, in a civil case of concurrent jurisdiction, might be pleaded in bar of an action for the same cause instituted in a circuit court of the United States.

There was another difficulty, not so easily surmounted, and that was, whether, if a conviction of a crime against the United States be had in a state court admitted to have concurrent jurisdiction, the governor of the state would have the power to pardon, and in that way control the law and policy of the United States. Judge Washington, in speaking for the court, did not answer this question, but contented himself with merely observing, that he was by no means satisfied that the governor could pardon, but that
*400 if *he could, it would furnish a reason for vesting the jurisdiction of criminal matters exclusively in the federal courts.

The conclusion then, is, that in judicial matters, the concurrent jurisdiction of the state tribunals depends altogether upon the pleasure of Congress, and may be revoked and extinguished whenever they think proper, in every case in which the subject-matter can constitutionally be made cognizable in the federal courts; and that, without an express provision to the contrary, the state courts will retain a concurrent jurisdiction, in all cases where they had jurisdiction originally over the subject-matter. (*a*) We will next

(*a*) In the case of Delafield *v.* The State of Illinois, it was decided in the Court of Errors of New York, in December, 1841, upon appeal from a decree in chancery, that the state courts have a concurrent jurisdiction with the Supreme Court of the United States, in suits between a state and citizens of another state, and the decree in chancery was affirmed. 2 Hill (N. Y.) 159; S. C. 26 Wendell, 192. The federal courts have exclusive jurisdiction when a state is defendant, (at the suit of another state,) and when crimes are committed against the United States, and when Congress have declared the jurisdiction of the federal courts exclusive. Id.[1]

[1] There is nothing in the constitution of the United States to deprive the state courts of their jurisdiction, as to suits against a state, by citizens of another state or of a foreign state. The Court of Chancery assumes jurisdiction in a suit to which a state is a party, not to compel the state to perform a decree, but to enable it to appear and protect its rights. Garr *v.* Bright, 1 Barb. Ch. 157.

The concurrent jurisdiction of the state courts was attentively considered by the

see whether this state jurisdiction does not equally depend upon the volition of the state courts.

There are various acts of Congress in which duties have been imposed on state magistrates and courts, and by which they have been invested with jurisdiction in civil suits, and over complaints and prosecutions in penal and criminal cases, for fines, penalties, and forfeitures, arising under laws of the United States. We have seen a very clear intimation given by the judges of the Supreme Court, that the state courts were not bound, in consequence of any act of Congress, to assume and exercise jurisdiction in such cases. It was merely permitted to them to do so, as far as was compatible with their state obligations; and in some instances the state courts have acted in those cases, and in other instances they have declined jurisdiction, though expressly vested with it by the act of Congress.

In the case of *Ferguson*, (*b*) an application was made to the Supreme Court of New York, for the allowance of a *habeas corpus* to bring up the party alleged to be detained in custody by an officer of the army of the United States, on the ground of being an enlisted soldier; and the allegation was, that he was an infant, and so not duly enlisted. It was much discussed, whether the state courts had concurrent *jurisdiction, by *habeas corpus*, *401 over the question of unlawful imprisonment, when that imprisonment was by an officer of the United States, by color, or under pretext of the authority of the United States. The Supreme Court did not decide the question, and the motion was denied on other grounds; but subsequently, *In the matter of Stacy*, (*a*) the same court exercised a jurisdiction in a similar case, by allowing and enforcing obedience to the writ of *habeas corpus*. The question was therefore settled in favor of a concurrent jurisdiction in

(*b*) 9 Johns. 239. (*a*) 10 Johns. 328.

New York Court of Appeals, in Teall *v.* Felton, 1 Comst. 537, where it was held that trover would lie in the state courts against a postmaster for improperly detaining a newspaper, although such detention was claimed to be rightful under the laws of the United States and the regulations of the Post-Office Department. But when the right in controversy is created by an act of Congress, and the remedy is prescribed to be by suit in the federal courts, the state courts have no jurisdiction as in the case of a patent right. Dudley *v.* Mayhew, 3 Comst. 9. As to the right of state courts to issue writs of *habeas corpus* in favor of persons imprisoned under color of federal authority, see *post*, marginal page 32, pt. 4.

that case, and there has been a similar decision and practice by the courts of other states. (*b*) [1]

The Supreme Court of New York, in the case of *The United States* v. *Dodge*, (*c*) held that they had jurisdiction, and did sustain a suit on a bond for duties given to a collector of the United States customs. The suit was authorized by the Judiciary Act of 1789, giving concurrent jurisdiction to the state courts in suits at common law, where the United States were plaintiffs. (*d*) Afterwards, in the case of *The United States* v. *Lathrop*, (*e*) the same court discussed, very much at large, the question, whether a state court had jurisdiction of an action in favor of the United States, to recover a penalty or forfeiture for breach of a law of the United
* 402 States, and when a suit for the penalty was by the * act declared to be cognizable in a state court. It was decided that the court had no such jurisdiction, and that it could not even be conferred by an act of Congress. The difference between this case and the one preceding was, that the preceding case was a suit on a bond given to a collector of the customs for duties, and this was an action of debt for a penalty for breach of the excise law. They were both cases of debts due to the United States, but the one was a civil debt, and the other a penalty for breach of a revenue law; and this slight difference in the nature of the demand was considered to create a most momentous difference in its results upon the great question of jurisdiction. It was the opinion of the court that Congress could not invest the state courts with a jurisdiction which they did not enjoy concurrently before the adoption

(*b*) Case of Lockington, before Tilghman, Chief Justice of Pennsylvania, November, 1813, 5 Hall L. J. 92; same case, 5 Hall L. J. 301–330. A similar case in Maryland, 5 Hall L. J. 486; and in South Carolina, 5 Hall L. J. 497. Commonwealth *v.* Harrison, 11 Mass. 63; Case of Joseph Almeida, in Maryland, and the case of Pool and others, in Virginia, cited in Sergeant's Constitutional Law, pp. 279, 280. By the New York Revised Statutes, vol. ii. p. 563, sec. 22, a *habeas corpus* may be awarded, unless the party be detained by process from a court or judge of the United States, having *exclusive* jurisdiction in the case.

(*c*) 14 Johns. 95.

(*d*) The act of Congress of September 24th, 1789, c. 20, sec. 33, declared, that for any crime or offence against the United States, any justice of the peace, or other magistrate *of any of the states*, might cause the offender to be arrested and imprisoned, or bailed under the usual mode of process.

(*e*) 17 Johns. 4.

[1] Commonwealth *v.* Fox, 7 Barr, 336.

of the constitution; and a pecuniary penalty for a violation of an act of Congress was a punishment for an offence created under the constitution, and the state courts had no jurisdiction of the criminal offences or penal laws of the United States. The Judiciary Act of 1789 was the true exposition of the constitution with respect to the concurrent jurisdiction of the state courts, and the exclusive jurisdiction of those of the United States; and by that act the exclusive cognizance of all crimes and offences cognizable under the authority of the United States, and of all suits for penalties and forfeitures, was given to the federal courts. The Judiciary Act in no instance excluded the previously existing jurisdiction of the state courts, except in a few specified cases of a national nature; but their jurisdiction was excluded in all criminal cases, and with respect to offences arising under the acts of Congress. In such cases the federal jurisdiction was necessarily exclusive; but it was not so as to pre-existing matters within the jurisdiction of the state courts. (*a*)

The doctrine seems to be admitted, that Congress cannot compel a state court to entertain jurisdiction in any case. (*b*) *It only permits state courts which are competent for the *403 purpose, and have an inherent jurisdiction adequate to the case, to entertain suits in the given cases; and they do not become inferior courts in the sense of the constitution, because they are not ordained by Congress. The state courts are left to infer their own duty from their own state authority and organization; but if they do voluntarily entertain jurisdiction of causes cognizable under the authority of the United States, they assume it upon the condition that the appellate jurisdiction of the federal courts shall apply. Their jurisdiction of federal causes is, however, confined to civil actions, or to enforce penal statutes; and they cannot hold criminal jurisdiction over offences exclusively existing as offences against the United States. Every criminal prosecution must charge the offence to have been committed against the sovereign whose courts sit in judgment upon the offender, and whose executive may pardon him. (*a*)

(*a*) Ely *v.* Peck, 7 Conn. 239. Davison *v.* Champlin, Ibid. 244, S. P.

(*b*) Dewey J., in Ward *v.* Jenkins, 10 Metcalf, 583.

(*a*) It has been a question of grave discussion how far treason may be committed against one of the United States separately considered. If the same crime amounted to treason against the United States, the exclusive cognizance of the crime belonged to

We find a similar doctrine in one of the courts in the state of Ohio, in the case of *The United States* v. *Campbell*. (*a*) That was an information filed by the collector of the revenue, to recover a penalty for breach of the excise law; and the court held it to be a criminal prosecution, and that one sovereign state could not make use of the municipal courts of another government to enforce its penal laws; and it was not in the power of Congress to vest such a jurisdiction in the state courts. Upon the same principle, the Court of Errors in Virginia, in the case of *The State* v. *Feely*, decided that it had no jurisdiction to punish by indictment stealing packets from the mail, as that was an offence created by act of Congress. (*b*) And in *Jackson* v. *Row*, the General Court of Virginia made the same decision precisely as that made in New York, in the case of *Lathrop*; and it held that the act of Congress
*404 authorizing such suits for penalties in *the state courts, was not binding. It was decided in another case in Virginia, (*a*) that Congress could not give jurisdiction to, or require services of, a state court, or magistrate, as such, nor prosecute in

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the courts of the United States. This was the doctrine of the Supreme Court of New York, in the case of The People *v.* Lynch, 11 Johns. 549. But it was agreed in that case, that treason might be committed against a state, as by opposing the laws, or forcibly attempting to usurp the government, and be not at the same time merged in the crime against the United States. But *levying war* against one state is a levying of war against all in their federal capacity, and is a crime belonging exclusively to the federal government. The limitation of treason against a state in its distinct capacity would seem to be confined to cases in which the open and armed opposition to the laws is not accompanied with the intention of *subverting the government*. However, the statute laws in many of the states by their language cover the whole enlarged ground of treason, and the line of demarcation is not distinctly defined. See an able essay on this subject in the American Law Magazine, No. 8, for January, 1845. The act of the legislature of New York, 1 N. Y. R. S. pp. 170, 326, 3d edit., assumes that treason, committed within the state, may be cognizable and punishable by its laws. This was also the doctrine of the Supreme Court of Rhode Island in Dorr's trial, and is the doctrine of such distinguished elementary writers as Mr. Rawle and Mr. Sergeant. See Wharton's American Criminal Law, Phil. 1846, pp. 586 – 592.[1]

(*a*) 6 Hall's Law Journal, 113.

(*b*) Sergeant's Const. Law, p. 272; Virginia Cases, 321, S. C.

(*a*) Ex parte Pool, Sergeant's Const. Law, p. 274.

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[1] In 1860 John Brown invaded the State of Virginia with a small armed force, for the purpose of liberating the slaves held under the laws of that state, and subverting the state government. He was convicted of treason, in one of the local tribunals, and executed.

the state courts for a public offence. In Kentucky it was held, as late as 1833, (*b*) that no state court could take cognizance of a penal case arising under an act of Congress. Such a jurisdiction would require an act of the state, and the consent of Congress.

After these decisions in Virginia, Ohio, Kentucky, and New York, the act of Congress of 3d March, 1815, c. 100, may be considered as essentially nugatory. That act vested in the state courts, concurrently with the federal courts, cognizance of all "complaints, suits, and prosecutions for taxes, duties, fines, penalties, and forfeitures, arising and payable under any act of Congress, passed or to be passed, for the collection of any direct tax or internal duties"; and it gave to the state courts and the presiding judge thereof the same power as was vested in the district judges, to mitigate or remit any fine, penalty, or forfeiture. (*c*) And here the inquiry naturally suggests itself, can the state courts, consistently with those decisions, sustain a criminal prosecution for forging the paper of the Bank of the United States, or for counterfeiting the coin of the United States? These are cases arising under acts of Congress declaring the offence. The state courts have exercised criminal jurisdiction over these offences, as offences against the state; but it is difficult to maintain the jurisdiction upon the doctrine of the Supreme Court of New York, in the case of *Lathrop;* and if it be entertained, there are difficulties remaining to be definitively cleared. These difficulties relate to the effect of a prosecution in one jurisdiction upon the jurisdiction of the concurrent court, and to the effect of the executive power of pardon of the crime under one government, upon the claim of concurrent jurisdiction. (*d*)[1]

(*b*) Haney *v.* Sharp, 1 Dana, 442.

(*c*) The act of Congress of February 28th, 1839, c. 36, sec. 3, notwithstanding the state decisions, authorized all *pecuniary penalties and forfeitures* under the laws of the United States, to be sued for before any court of competent jurisdiction in the state or district where the cause of action arises, or the offender may be found. It was said, in the case of Prigg *v.* Comm. of P. 16 Peters U. S. 539, that the state magistrates *might*, if they chose, exercise powers conferred upon them by act of Congress, unless prohibited by state legislation.

(*d*) In the case of The State *v.* Randall, 2 Aiken, 89, the Supreme Court of Vermont decided, in 1827, that the state courts had concurrent criminal jurisdiction over the offences of counterfeiting and passing counterfeit bills of the Bank of the United States. And in the case of The State *v.* Wells, 2 Hill (S. C.) 687, it was held, that the

[1] See *ante*, p. [390,] note (1.)

state courts had concurrent cognizance of the indictable offence of opening a letter contrary to the act of Congress, and that Congress might constitutionally confer such a jurisdiction. On the other hand, it was decided in Missouri, in Mattison *v.* The State, 3 Missou. 421, that their courts had no cognizance of the case of counterfeiting the current coin, and that a statute of the state, providing for the cognizance and punishment of such crimes, was void. The doctrine was, that the states had no concurrent legislation on the subject, and that the power resided exclusively in Congress. So, the constitution of the United States (art. 4, sec. 2) having declared that persons held to service or labor in one state, under the laws thereof, and escaping into another, should be delivered up, on claim of the party to whom such service or labor might be due; the laws of New York, in furtherance of this duty, have provided for the arrest of such fugitives, on *habeas corpus*, founded on due proof, and for a certificate in favor of the right of the claimant, and delivery of the fugitive to him to be removed. But the fugitive is entitled to his writ of *homine replegiando*, notwithstanding the *habeas corpus* and certificate. N. Y. Revised Statutes, vol. ii. p. 560, sec. 6–20. See vol. 2d, p. 32, on this point, and see, in American Jurist for April, 1837, vol. xvii. pp. 96–113, the substance of the report of the committee on the judiciary in the legislature of Massachusetts, respecting the validity of the act of Congress of February 12th, 1793, providing for the seizure and surrender of fugitive slaves. It urges the right and duty of providing, by the writ of *habeas corpus* or of *replevin*, for the trial by jury of the question whether the person seized be a freeman or a slave. The act of Congress authorizes the owner of the fugitive slave, by himself or his agent, to seize at once the fugitive slave, and carry him before a judge of the United States, or any magistrate of the county, city, or town, in the state where the slave is seized, and upon satisfying the magistrate by proof that the person seized is such fugitive slave, he is to give a certificate, which amounts to a warrant to remove the slave. This law is generally found to be insufficient to give the claimant the requisite constitutional protection in his property, or the fugitive due protection of his liberty; and its execution meets with embarrassment in the northern states, and several of them have endeavored, by local statutes, to supply the deficiency. The constitution of the United States, and the act of Congress, evidently contemplated summary ministerial proceedings, and not the ordinary course of judicial investigation. Story's Comm. on the Constitution of the United States, vol. iii. 677. Wright *v.* Deacon, 5 Serg. & Rawle, 62. In the last case it was held, that the writ of *homine replegiando* did not lie to try the right of the fugitive to freedom, though on the return of the fugitive to the state from which he fled, his right to freedom might be tried. See, further, *infra*, vol. ii. 32, notes, c, d. Ibid. 257, note 6. It seems to be an unsettled question whether statute provisions relative to the surrender of fugitives from labor, in obedience to the constitution of the United States, be of exclusive jurisdiction in the United States, or may be aided by auxiliary statute provisions in the states. But the case of Prig *v.* The Commonwealth of Pennsylvania, 16 Peters U. S. 539, may be considered as settling the question in favor of the exclusive jurisdiction of the United States. See, *infra*, vol. ii. 32, 248.[2] It was there declared, that the national government, in the absence of all positive pro-

[2] Thornton's case, 11 Ill. 332. In the matter of Kirk, 1 Parker C. R. 67. In the matter of Perkins, 2 Cal. 424, an act which gave remedies in the state courts to the claimants of fugitives was held to be not unconstitutional, but a competent legislative act under the police power of the state. It is held in the Supreme Court, that a state enactment, imposing a penalty on any one who should harbor or secrete a fugitive slave, did not conflict with the law of the United States. Moore *v.* Illinois, 14 How. U. S. 13. McLean J., dissenting.

visions to the contrary, was bound, through its proper department, legislative, executive, or judiciary, as the case might require, to carry into effect all the rights and duties imposed upon it by the constitution. Any legislation by Congress, in a case within its jurisdiction, supersedes all state legislation, and impliedly prohibits it. See Houston *v.* Moore, 5 Wheaton, 21, 22. Sturges *v.* Crowninshield, 4 Wheaton, 122, 193, S. P.[1]

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[1] The act of 1793, providing for the reclamation of fugitives from justice and from service, has, so far as it relates to the latter, been amended, and to a considerable extent superseded by the act of September 18, 1850. The act of 1850 has repealed, so far as concerns the penalty, the fourth section of the act of 1793. Norris *v.* Crocker, 13 How. U. S. 429.

The judicial duties imposed by this act are to be performed by any United States commissioners who may have the power of arresting or imprisoning for offences against the United States, (United States *v.* Stowell, 2 Curtis C. C. 153,) by the judges of the Circuit and District Courts of the United States, and of the Superior Courts of territories, and by such special commissioners as the respective courts may appoint.

It is made the duty of all United States marshals to obey and execute all warrants and process of such judges and commissioners; and, after the arrest of any fugitives, such officers are liable for an escape with or without their assent. The commissioners are authorized to appoint suitable persons to execute process and warrants.

When any fugitive has escaped, or shall escape, into another state or territory, the owner, or his duly authorized agent, may pursue and personally arrest said fugitive, or may demand a warrant and arrest from the officer having due authority; when the fugitive must be taken before a commissioner or judge, whose duty it is to hear and determine the complaint in a summary manner. And upon satisfactory proof to be taken before him, or by other satisfactory testimony taken in the state from which the fugitive fled, and also affidavits of the identity of the fugitive, and that he owes service to the claimant, and that he escaped, it is the duty of such judge or commissioner to deliver to the claimant a certificate of the proceeding had, with authority to remove the fugitive to the place from which he fled. The testimony of the fugitive is not admissible. Any assistance rendered to a fugitive to enable him to escape from the claimant, or any obstruction offered to his arrest, is made penal, and also subjects the party to damages at the suit of the owner. Weimer *v.* Sloane, 6 McLean, 259.

All citizens are required, when called upon, to render the officers personal assistance when they may be resisted in the performance of their duties. No authority, in the execution of this act, is conferred upon any person but the officers of the United States, and persons authorized by them. See Moore *v.* Illinois, 14 How. U. S. 13. Graves *v.* The State, 1 Smith (Ind.) R. 258. Held, in this case, that the state has no authority to prescribe the mode in which the claimant shall proceed to arrest the fugitive.

The act of 1850 is more stringent and penal in its provisions than the one of 1793; but no serious difference, in point of constitutionality, has ever been suggested. The statute of 1850 has been repeatedly examined, and its conformity to the constitution established beyond controversy. Sims case, 7 Cush. 285. Miller *v.* McQuerry, 5 McLean, 469. Charge of Judge Nelson, 1 Blatch. C. C. 635. Ex parte 9 Ohio State, 77. Henry *v.* Lowell, 16 Barb. (N. Y.) 268. United States *v.* Booth, 21 How. U. S. 506. And see opinions of Judges, 46 Maine, 561.

LECTURE XIX.

OF CONSTITUTIONAL RESTRICTIONS ON THE POWERS OF THE SEVERAL STATES.

We proceed to consider the extent and effect of certain constitutional restrictions on the authority of the separate states. As the constitution of the United States was ordained and established by the people of the United States, for their own government as a nation, and not for the government of the individual states, the powers conferred, and the limitations on power contained in that instrument, are applicable to the government of the United States, and the limitations do not apply to the state governments unless expressed in terms. Thus, for instance, the provision in the constitution that private property shall not be taken for public use without just compensation, was intended solely as a limitation on the exercise of power by the government of the United States, and does not apply to the state governments. (*a*) The people of the respective states are left to create such restrictions on the exercise of the power of their particular governments as they may think proper; and restrictions by the constitution of the United States, on the exercise of power by the individual states, in cases not consistent with the objects and policy of the powers vested in the Union, are expressly enumerated.[1]

"No state," says the constitution, (*b*) "shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attain-

(*a*) Barron *v.* The Mayor and City Council of Baltimore, 7 Peters U. S. 243. See, also, in the matter of Smith, 10 Wendell, 449.

(*b*) Art. 1, sec. 10.

[1] Although no state can be permitted to establish a permanent military government, yet a state may use its military power to put down an armed insurrection, too strong to be controlled by the civil authority. Luther *v.* Borden, 7 How. U. S. 1. The interests involved in this case are of unusual importance, extending to the fundamental principles of the government, and they received a thorough and profound discussion.

der, *ex post facto* law, or law impairing the obligation of contracts; or grant any title of nobility. No state shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, nor lay any duty on tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."

Most of these prohibitions would seem to speak for themselves, and not to stand in need of exposition. I shall confine myself to those cases in which the interpretation and extent of some of these restrictions have been made the subject of judicial investigation.

(1.) *Bills of credit.*

Bills of credit.

Bills of credit, within the purview of the constitution of the United States, prohibiting the emission of them, are declared * to mean promissory notes, or bills issued by a *408 state government, exclusively on the credit of the state, and intended to circulate through the community for its ordinary purposes as money redeemable at a future day, and for the payment of which the faith of the state is pledged. (*a*) The prohibition

(*a*) Craig *v.* The State of Missouri, 4 Peters U. S. 410. In the case of Briscoe *v.* The Bank of Kentucky, 11 Peters U. S. 257, the question what were *bills of credit* of which the emission was prohibited to the states, was extensively discussed. They were defined to be *paper issued by the authority of a state on the faith of the state, and designed to circulate as money;* and under this definition it was adjudged, that a bank of the State of Kentucky, established in the name and on behalf of the state, under the direction of a president and twelve directors chosen by the legislature, and the bank exclusively the property of the state, and with a capital of two millions, and with authority to issue notes payable to bearer on demand, and receive deposits and make loans; and the notes of which bank, by a subsequent act, were to be received on executions by plaintiff, and if refused, further proceedings to be delayed on the judgment for two years, *was not within the prohibition of the Constitution of the United States against the emission of bills of credit.* Mr. Justice Story dissented from this decision, and said that the late Chief Justice Marshall was of opinion with him, when the same case was before the court, and argued at a preceding term; and he further said, that he would not distinguish the case in principle from that of Craig *v.* The State of Missouri. It appears to me, with great submission to the Supreme Court, that this decision essentially overrules the case of Craig, and greatly impairs the force and value of the constitutional prohibition. In the case of Linn *v.* State Bank of Illinois, 1 Scam. 87, decided by the Supreme Court of that state in 1833, it appeared that the State Bank of Illinois was owned by the state, and authorized to issue notes or bills in small sums from twenty dollars to one dollar, drawing interest, and receivable in payment of debts due to the state; and that the legislature were

does not therefore apply to the notes of a state bank, drawn on the credit of a particular fund set apart for the purpose. (*b*) Through all our colonial history, paper money was much in use; and from the era of our independence down to the date of the constitution, bills of credit, issued under the authority of the confederation Congress, or of the individual states, and intended for circulation from hand to hand, were universally denominated *paper money;* and it was to bar the governmental issues of such a delusive and pernicious substitute for cash, that the constitutional prohibition was introduced. The issuing of such bills by the state of Missouri, under the denomination of *certificates*, was adjudged to be unconstitutional, though they were not made generally a legal tender, but they were, nevertheless, made receivable in payment of taxes, and by all civil and military officers in discharge of salaries and fees of office. Instruments, however, issued by or on behalf of a state, binding it to pay money at a future day, for services actually received, or for money borrowed for present use, were declared not to be bills of credit, within the meaning of the constitution. (*c*)

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pledged to redeem the bills, and creditors were stayed from collecting their debts for three years, unless they would receive the bills in payment. The court held, that the analogy was so striking between that institution and the Missouri loan office, as to render the decision in Craig *v.* The State of Missouri in point, and binding on the states; and, consequently, it was adjudged that the act establishing the State Bank of Illinois was unconstitutional, and its notes void. And in the case of McFarland *v.* The State Bank, 4 Ark. 44, the Supreme Court of Arkansas held itself bound and concluded by the decision in Briscoe *v.* The Bank of Kentucky, though it was admitted to be inconsistent with the doctrine and decision in the prior case of Craig *v.* The State of Missouri. The court evidently regretted that the case of Craig had been overruled, as it contained the sound and true constitutional doctrine. The Bank of Arkansas stood on the same ground, and had the same essential qualities, and its notes were bills of credit within the decision of Craig, and not bills of credit within the decision of Briscoe, and the latter decision they held themselves bound to obey.[1]

(*b*) Billis ads. The State, 2 M'Cord, 12.

(*c*) Craig *v.* The State of Missouri, *ub. sup.* Mr. Justice Story, in his Commentaries on the Constitution, vol. iii. p. 19, seems to be of opinion, that, independent of long-continued practice from the time of the adoption of the constitution, the states would not, upon a sound construction of the constitution, if the question was *res integra*, be authorized to incorporate banks, with a power to circulate bank paper as currency, inasmuch as they are expressly prohibited from coining money. He cites the opinions of Mr. Webster, of the Senate of the United States, and of Mr. Dexter, formerly Secre-

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[1] The principle of Briscoe *v.* The Bank of Kentucky was reaffirmed in Darrington *v.* Bank of Alabama, 13 How. U. S. 12.

(2.) *No state can pass any ex post facto law.* *Ex post facto laws.*

In *Calder* v. *Bull*, (*d*) the question on the meaning of an *ex post facto* law, within the prohibition of the constitution, was extensively discussed.

The legislature of Connecticut had, by a resolution or law, set aside a decree of the Court of Probates, rejecting a will, and directed a new hearing before the Court of Probates, and the point was, whether that resolution was an *ex post facto* law prohibited by the constitution of the United States.

It was held, that the words *ex post facto* laws were technical expressions, and meant every law that made an act done before the passing of the law, and which was innocent when * done, criminal; or which aggravated a crime, and made * 409 it greater than it was when committed; or which changed the punishment, and inflicted a greater punishment than the law annexed to the crime when committed; or which altered the legal rules of evidence, and received less or different testimony than the law required at the time of the commission of the offence, in order to convict the offender. The Supreme Court concluded, that the law or resolution of Connecticut was not within the letter or intention of the prohibition, and was, therefore, lawful. (*a*) Afterwards, in *Fletcher* v. *Peck*, (*b*) it was observed that an *ex post facto* law was one which rendered an act punishable in a manner in which

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tary of War, on the same side. But the equal, if not the greater authority of Mr. Hamilton, the earliest Secretary of the Treasury, may be cited in support of a different opinion, and the contemporary sense and uniform practice of the nation are decisive on the question. Bank paper, like checks and negotiable notes, circulates entirely upon private credit, and is not a coercive circulation. It is at every person's option to receive or reject it. The constitution evidently had in view bills of credit issued by law, in the name and on the credit of the state, and intended for circulation from hand to hand as money, and of which our history furnished so many pernicious examples. The words of the constitution are, that *no state shall emit bills of credit*. The prohibition does not extend to bills emitted by individuals, singly or collectively, whether associated under a private agreement for banking purposes, as was the case with the Bank of New York prior to its earliest charter, in the winter of 1791, or acting under a charter of incorporation, so long as the state lends not its credit, or obligation, or coercion, to sustain the circulation. In the case of Briscoe *v.* The Bank of the Commonwealth of Kentucky, this question was put at rest, by the opinion of the court, that there was no limitation in the constitution on the power of the states to incorporate banks, and their notes were not intended to be inhibited, nor were considered as *bills of credit*. 11 Peters U. S. 257, 345 – 349.

(*d*) 3 Dallas, 386.

(*a*) Strong *v.* The State, 1 Black. (Ind.) 193, S. P.

(*b*) 6 Cranch, 138.

it was not punishable when it was committed.[1] This definition is distinguished for its comprehensive brevity and precision, and it extends to laws passed after the act, and affecting a person by way of punishment of that act, either in his person or estate. *Ex post facto* laws relate to penal and criminal proceedings, which impose punishments or forfeitures, and not to civil proceedings, which affect private rights retrospectively. Retrospective laws and state laws, devesting vested rights, unless *ex post facto*, or impairing the obligation of contracts, do not fall within the prohibition contained in the constitution of the United States, however repugnant they may be to the principles of sound legislation. (*c*)

State courts no control over the federal courts.

(3.) *No state can control the exercise of any authority under the federal government.*

The state legislatures cannot annul the judgments, nor determine the extent of the jurisdiction, of the courts of the Union. This was attempted by the legislature of Pennsylvania, and declared to be inoperative and void by the Supreme Court of the United States, in the case of *The United States* v. *Peters*. (*d*)

Such a power, as we have heretofore seen, necessarily re-
* 410 sides in the supreme judicial tribunal * of the nation. It has also been adjudged, that no state court has authority or jurisdiction to enjoin a judgment of the Circuit Court of the United States, or to stay proceedings under it. This was attempted by a state court in Kentucky, and declared to be of no validity by the Supreme Court of the United States, in *M'Kim* v. *Voorhies*. (*a*) No state tribunal can interfere with seizures of property made by revenue officers, under the laws of the United States; nor interrupt, by process of replevin, injunction, or otherwise, the exercise of the authority of the federal officers; and any intervention of state authority for that purpose is unlawful.[1] This was so declared by the Supreme Court in *Slocum* v. *Mayberry*. (*b*) Nor can a state court

(*c*) Calder *v.* Bull, 3 Dallas, 386; Satterlee *v.* Matthewson, 2 Peters U. S. 413; Watson *v.* Mercer, 8 Ibid. 88.

(*d*) 5 Cranch, 115.

(*a*) 7 Cranch, 279.

(*b*) 2 Wheaton, 1. Any restraint by state authority on state officers in the execution of the process of their courts, is altogether inoperative upon the officers of the United States in the execution of the mandates which issue to them. Baldwin J., in McNutt *v.* Bland, 2 How. U. S. 17.

[1] Any law changing the punishment of a criminal act committed before its passage is *ex post facto*, and void, unless the change consist in the remission of a separate part of the punishment. Hartung *v.* The People, 22 N. Y. 95; Sanchez *v.* The People, Id. 147.

[1] See Freeman *v.* Howe, 24 How. U. S. 450.

issue a *mandamus* to an officer of the United States. This decision was made in the case of *M'Cluny* v. *Silliman*, (*c*) and it arose in consequence of the Supreme Court in Ohio sustaining a jurisdiction over the register of the land office of the United States, in respect to his ministerial acts as register, and claiming a right to award a *mandamus* to that officer to compel him to issue a final certificate of purchase. The principle declared by the Supreme Court was, that the official conduct of an officer of the government of the United States can only be controlled by the power that created him.

If the officer of the United States who seizes, or the court which awards the process to seize, has jurisdiction of the subject-matter, then the inquiry into the validity of the seizure belongs exclusively to the federal courts. But if there be no jurisdiction in the instance in which it is asserted, as if a marshal of the United States, under an execution in favor of the United States against A, should seize the person or property of B, (*d*) then the state courts have jurisdiction to protect the person and the property so illegally invaded; and it is to be observed that the jurisdiction of the state courts in Rhode Island was admitted by
* the Supreme Court of the United States, in *Slocum* v. *Mayberry*, upon that very ground. *411

In the case of *The United States* v. *Barney*, (*a*) the district judge of Maryland carried to a great extent the exemption from state control of officers or persons in the service of the United States, and employed in the transportation of the mail. He held, that an innkeeper had no lien on the horses which he had fed, and which were employed in the transportation of the mail. The act of Congress of March, 1790, prohibited all wilful obstruction of the passage of the mail; and a claim for debt would not justify the stopping of the mail, or the means necessary to transport it, either upon principles of common law, or upon the statute. The judge stated, in this case, that even a stolen horse found in the mail stage could not be seized; nor could the driver, being in debt, or having committed an offence, be arrested, in such a way as to obstruct the passage of the mail. But in a subsequent case in the Circuit Court of Pennsylvania, (*b*) it was held, that the act of Con-

(*c*) 6 Wheaton, 598.
(*d*) Bruen *v.* Ogden, 6 Halst. 370; Dunn *v.* Vail, 7 Martin (Louis.) 416.
(*a*) 3 Hall's Law Journal, 128.
(*b*) United States *v.* Hart, 1 Peters C. C. 390.

gress was not to be so construed as to endanger the public peace and safety. The carrier of the mail, driving through a populous city with dangerous rapidity, and contrary to a municipal ordi nance, may be stopped, and the mail temporarily detained by an officer of the city. So, if the officer had a warrant against a felon in the stage, or if the driver should commit murder in the street, and then place himself on the mail stage box, he would not be protected from arrest, though a temporary stoppage of the mail might be the consequence. The public safety in one case is of more moment than the public inconvenience which it might produce in the other. (*c*)

But while all interference on the part of the state authorities with the exercise of the lawful powers of the national government has been, in most cases denied, there is one case in which
*412 any control by the federal over the state *courts, other than by means of the established appellate jurisdiction, has equally been prevented. In *Diggs and Keith* v. *Wolcott*, (*a*) it was decided generally, that a court of the United States could not enjoin proceedings in a state court; and a decree of the Circuit Court of the United States for the district of Connecticut was reversed, because it had enjoined the parties from proceeding at law in a state court. So in *Ex parte Cabrera*, (*b*) it was declared, that the circuit courts of the United States could not interfere with the jurisdiction of the courts of a state. These decisions are not to be contested; and yet the district judge of the northern district of New York, in the spring of 1823, in the case of *Lansing and Thayer* v. *The North River Steamboat Company*, enjoined the defendants from seeking in the state courts, under the acts of the state legislature, the remedies which those acts gave them. This would appear to have been an assumption of the power of control over the jurisdiction of the state courts, in hostility to the doctrine

(*c*) A toll-gate keeper, on a national road passing through a state, cannot stop the coach carrying the United States mail, for a refusal to pay toll. The remedy, if any, is by action against the contractor. Hopkins *v.* Stockton, 2 Watts & Serg. 163.

(*a*) 4 Cranch, 179, S. P. In Kittredge *v.* Emerson, in Sup. Court of New Hampshire, July term, 1844, 15 N. Hamp. 227, and in Dudley's case, C. C. U. S. for Pennsylvania, 1 Pennsylvania Law Journal, 302; Carrell *v.* F. & M. Bank, Harr. (Mich.) Ch. 197. Neither the United States nor the state courts can interfere or control the operations of each other. The courts of the United States can only interfere by their appellate jurisdiction, and the state courts have no power to interfere by injunction. 3 Story's Comm. on the Constitution, 621 – 626.

(*b*) 1 Wash. C. C. 232; United States *v.* French, 1 Gallison, 1, S. P.

of the Supreme Court of the United States. (*c*) In the case of *Kennedy* v. *Earl of Casillis*, (*d*) an injunction had been unwarily granted in the English Court of Chancery, to restrain a party from proceeding in a suit in the Court of Sessions in Scotland, where the parties were domiciled. It was admitted that the Court of Sessions was a court of competent jurisdiction, and an independent foreign tribunal, though subject to an appeal like the Court of Chancery, to the House of Lords. If the Court of Chancery could in that way restrain proceedings in the Court of Sessions, the sessions might equally enjoin proceedings in chancery, and thus stop all proceedings in either court. Lord Eldon said he never meant to go further with the injunction than the property in England; and he, on motion, dissolved it *in toto*. (*e*)[1]

*(4.) *No state can pass any law impairing the obligation of contracts.* *413

No state can impair the obligation of contracts.

We come next to a prohibition of great moment, and affecting extensively and deeply the legislative authority of the states. There is no prohibitory clause in the constitution which has given rise to more various and able discussions, or more protracted litigation, than that which denies to any state the right to pass any law impairing the obligation of contracts. I shall endeavor to give a full and accurate view of the judicial decisions defining and enforcing this prohibition.

The case of *Fletcher* v. *Peck*, (*a*) first brought this prohibitory clause into direct discussion. The legislature of Georgia, by an

(*c*) The assumed jurisdiction was not afterwards sustained; and a bill in equity in a state court for an injunction, though against an alien or citizen of another state, was held not to be such a suit as was removable to a Circuit Court of the United States. 1 Paige, 183.

(*d*) 2 Swanst. 313. But in the subsequent case of Bushby *v.* Munday, 5 Madd. Ch. 297, the Vice-Chancellor granted an injunction, under special circumstances, to restrain proceedings in the Court of Sessions in Scotland. The New York Court of Chancery has disclaimed any such jurisdiction, in respect to a foreign suit previously commenced, though it were in possession of jurisdiction over the person of the party. Mead *v.* Merritt, 1 Paige, 402.

(*e*) It has been assumed and asserted by official authority, that the judicial power of the United States had no power to *enjoin* the executive branch of the government from the execution of a constitutional duty or of a constitutional law, any more than they could arrest the legislature itself in passing the law. Opinions of the Attorneys-General, July 27, 1824, vol. i. 507, 508.

(*a*) 6 Cranch, 87.

[1] See Williams *v.* Ayrault, 31 Barb. (N.Y.) 864.

act of 7th of January, 1795, authorized the sale of a large tract of wild land, and a grant was made, by letters patent, in pursuance of the act, to a number of individuals, under the name of the Georgia Company. Fletcher held a deed from Peck for a part of this land, under a title derived from the patent; and in the deed Peck had covenanted that the state of Georgia was lawfully seised when the act was passed, and had good right to sell, and that the letters patent were lawfully issued, and the title has not since been legally impaired. The action was for breach of covenant; and the breach assigned was, that the letters patent were void, for that the legislature of Georgia, by act of 13th February, 1796, declared the preceding act to be null and void, as being founded in fraud and corruption. One of the questions presented to the Supreme Court upon the case was, whether the legislature of Georgia could constitutionally repeal the act of 1795, and rescind the sale made under it.

*414 *The court declared, that when a law was in its nature a contract, and absolute rights have vested under that contract, a repeal of the law could not devest those rights, nor annihilate or impair the title so acquired. A grant was a contract within the meaning of the constitution. The words of the constitution were construed to comprehend equally executory and executed contracts, for each of them contains obligations binding on the parties. A grant is a contract executed, and a party is always estopped by his own grant. A party cannot pronounce his own deed invalid, whatever cause may be assigned for its invalidity, and though that party be the legislature of a state. A grant amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A grant from a state is as much protected by the operation of the provision of the constitution, as a grant from one individual to another; and the state is as much inhibited from impairing its own contracts, or a contract to which it is a party, as it is from impairing the obligation of contracts between two individuals.[1] It was accordingly de-

[1] The State of Arkansas chartered a bank, of which it owned all the stock, and provided in the charter that the bills of the bank should be received in payment of debts due the state; held, that a repeal of that provision could not impair the obligations of the state to receive bills issued prior to the repeal in payment of debts due the state. Woodruff *v.* Trapnal, 10 How. U. S. 190; Paup *v.* Drew, Id. 218. What is an impairing of a contract is discussed in Baltimore & S. R. Co. *v.* Nesbit, 10 How. U. S. 395; Butler *v.* Pennsylvania, Id. 402; East Hartford *v.* Hartford Bridge Co. Id. 511. See *post*, vol. iii.

clared, that the estate held under the act of 1795, having passed into the hands of a *bona fide* purchaser for a valuable consideration, the state of Georgia was constitutionally disabled from passing any law whereby the estate of the plaintiff could be legally impaired and rendered void.

The next case that brought this provision in review before the Supreme Court, was that of *The State of New Jersey* v. *Wilson*. (*a*) It was there held, that if the legislature should declare by law, that certain lands, to be thereafter purchased for the use of the Indians, should not be subject to any tax, such a legislative act amounted to a contract, which could not be rescinded by a subsequent legislation. In that case, the colonial legislature of New Jersey, in 1758, authorized the purchase of lands for the Delaware * Indians, and made that stipulation. Lands were * 415 accordingly purchased, and conveyed to trustees for the use of the Indians, and the Indians released their claim to other lands, as a consideration for this purchase. The Indians occupied these lands until 1803, when they were sold to individuals under the authority of an act of the legislature, and, in 1804, the legislature repealed the act of 1758, exempting those lands from taxation. The act of 1758 was held to be a contract, and the act of 1804 was held to be a breach of that contract, and void under the constitution of the United States.

The Supreme Court went again, and more largely, into the consideration of this delicate and interesting constitutional doctrine, in the case of *Terret* v. *Taylor*. (*a*) It was there held, that a legis-

(*a*) 7 Cranch, 164; In Brewster *v.* Hough, 10 N. Hamp. 138, it was held that the legislature of a state could not effectually devest itself of the power of taxation, for it was essentially a power of sovereignty or eminent domain, and the court considered the case of New Jersey *v.* Wilson might be sustained on the ground that it was in the nature of a treaty with the Indians. Ch. J. Marshall, in the case of Providence Bank *v.* Billings, 4 Peters U. S. 561, considered that it was not to be inferred, without positive stipulation, that a state had agreed to relinquish its power of taxation. But in Gordon *v.* Appeal Tax Court, 3 How. U. S. 133, it was adjudged that the legislature of a state might make a binding contract not to be impaired, to refrain from imposing any tax upon a bank or its stockholders. This would seem to remove the doubt suggested in the case in New Hampshire, and to show that a state may, in relation to any particular subject, and for reasons of public policy or consideration, contract that the sovereign power shall not be exercised. This point is ably discussed in the American Law Magazine for January, 1846, art. 4. State Bank of Ohio *v.* Knoop, 16 How. U. S. 369. And see Ohio L. Ins. & Trust Co. *v.* Debolt, 16 How. U. S. 416.

(*a*) 9 Cranch, 43.

lative grant, competently made, vested an indefeasible and irrevocable title. There is no authority or principle which could support the doctrine, that a legislative grant was revocable in its own nature, and held only *durante bene placito*.[1] Nor can the legislature repeal statutes creating private corporations, or confirming to them property already acquired under the faith of previous laws, and by such repeal vest the property in others, without the consent or default of the corporators. Such a proceeding would be repugnant to the letter and spirit of the constitution, and to the principles of natural justice.

But it was in the great case of *Dartmouth College* v. *Woodward*, (*b*) that the inhibition upon the states to impair by law the obligation of contracts, received the most elaborate discussion, and the most efficient and instructive application. It was there held, that the charter granted by the British crown to the trustees of Dartmouth College in 1769 was a contract within the meaning of the constitution, and protected by it; and that the college was a private charitable institution not liable to the control of the
*416 legislature; * and that the act of the legislature of New Hampshire, altering the charter in a material respect, without the consent of the corporation, was an act impairing the obligation of the charter, and consequently unconstitutional and void.

The chief justice, in delivering the opinion of the court, observed, that the provision in the constitution never had been understood to embrace other contracts than those which respect property, or some object of value, and confer rights which may be

(*b*) 4 Wheaton, 518.

[1] In Christ's Church *v.* Phil. 24 How. U. S. 300, it was held by the Supreme Court of the U. S. that an exemption from taxation contained in the charter of a corporation granted by a state, was in its nature *durante bene placito* and revocable by subsequent act. It was adjudged, however, by the same court in the Jefferson Branch Bank *v.* Skelly, 1 Black, 436, that a state in chartering a corporation might in express *terms*, and for a consideration, contract that the corporation should be exempt from taxation, and that a contract so made was protected from subsequent legislation. In that case the charter provided that six per cent of the profits of the bank should be paid to the state in lieu of taxes. See, also, Piqua Branch of the State Bank of Ohio *v.* Knoop, 16 How. U. S. 369, and Dodge *v.* Woolsey, 18 How. U. S. 331, where the same point was determined. In the Jefferson Branch Bank *v.* Skelly, 9 Ohio State, 606, the Supreme Court of Ohio refused to follow the two last-mentioned cases, and held that the act imposing the tax was constitutional. But on appeal in the Supreme Court of the U. S. the judgment was reversed. 1 Black, 436, *supra*.

asserted in a court of justice. Dartmouth College was a private eleemosynary institution, endowed with a capacity to take property for objects unconnected with government, and its funds were bestowed by individuals on the faith of the charter, and those funds consisted entirely of private donations. The corporation was not invested with any portion of political power, nor did it partake, in any degree, in the administration of civil government. It was the institution of a private corporation for general charity. The charter was a contract to which the donors, the trustees of the corporation, and the crown, were the original parties, and it was made on a valuable consideration, for the security and disposition of property. The legal interest, in every literary and charitable institution, is in trustees, and to be asserted by them, and they claim or defend in behalf of the religion, charity, and education, for which the corporation was created, and the private donations made. Contracts of this kind, creating these charitable institutions, are most reasonably within the purview and protection of the constitution. This contract remained unchanged by the Revolution; and the duties, as well as the powers of the government, devolved on the people of New Hampshire; but the act of that state which was complained of transferred the whole power of governing the college, from trustees appointed according to the will of the founder expressed in the charter, to the executive of New Hampshire. The will of the state was substituted for the will of the donors, in every essential operation of the college. The charter was reorganized in such a manner as * to convert a literary institu- *417
tion, moulded according to the will of its founders, and placed under the control of private literary men, into a machine entirely subservient to the will of government. This was, consequently, subversive of that contract, on the faith of which the donors invested their property; and the act of the legislature of New Hampshire was therefore held to be repugnant to the constitution of the United States.[1]

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[1] See State *v.* Heyward, 3 Rich. 389. See, also, Toledo Bank *v.* Bond, 1 Ohio State, 622. It is held in this case that the charter of a private corporation is not a contract within the inhibition of the Constitution of the United States; and it is denied that the contrary doctrine received the sanction of a majority of the court in the Dartmouth College case.

A state, it seems, has no authority to impair rights acquired under a *construction* given to an act. Lambertson *v.* Hogan, 2 Barr, 22.

Where the state parts with property, even by gift, it is a contract not to impair the

The same course of reasoning, and leading to the same conclusion, was adopted and expressed by some of the other judges.

In the opinion given by Judge Story, he added some new and interesting views of the nature of the contracts which the constitution intended to protect. He denied the power of the legislature to dissolve even the contract of marriage, without a breach on either side, and against the wishes of the parties. A dissolution of the marriage obligation, without any default or assent of the parties, may as well fall within the prohibition of the constitution, as any other contract for a valuable consideration. A man has as good a right to his wife as to the property acquired under a marriage contract; and to devest him of that right without his default, and against his will, would be as flagrant a violation of the principles of justice as the confiscation of his estate. (*a*) The prohibitory clause he also considered to extend to other contracts besides those where the parties took for their own private benefit. A grant to a private trustee, for the benefit of a particular *cestui que trust*, or for any special, private, or public charity, cannot be the less a contract, because the trustee takes nothing for his own benefit. Nor does a private donation, vested in a trustee for objects of a general nature, thereby become a public trust, which the government may, at its pleasure, take from the

(*a*) In Maguire *v.* Maguire, 7 Dana, 184, Ch. J. Robertson considered the contract of marriage to be *sui generis*, and unlike ordinary or commercial contracts. It was *publici juris*, and created by the public law, subject to the public will, and not to that of the parties, who could not dissolve it by mutual consent. It was much more than a contract. It established fundamental domestic relations, and he did not think it was embraced by the constitutional interdiction of legislative acts impairing the obligation of contracts. This appears to be the soundest construction of the constitutional provision alluded to.[2]

rights so acquired. Commercial Bank of Natchez *v.* Chambers, 8 Smedes and Marsh. 9. So a statute to confirm a vendee's title by the deed of a *feme covert*, ineffectual when made, has been held to be invalid, as impairing the obligation of contracts. Pearce *v.* Patton, 7 B. Mon. 162.

In Sheriff *v.* Lowndes, 16 Maryland, 357, it was held by the Maryland Court of Appeals that a statute changing the number and mode of electing trustees from that prescribed in the charter of an academy was unconstitutional, whether contributions had or had not been made to the institution by private individuals on the faith of the charter.

[2] To the same effect is the opinion of Mason J., in White *v.* White, 5 Barb. (N. Y.) 474, and the case of Noel *v.* Ewing, 9 Ind. 37. The court of Florida considers the marriage contract as within the protection of the constitution. Ponder *v.* Graham, 4 Florida, 23.

trustee. Government cannot revoke a grant even of its own funds, when given to a private person, or to a corporation, for special uses. It has no other remaining authority but what is judicial, to enforce the proper administration of the trust. Nor * is *418 a grant less a contract, though no beneficial interest accrues to the possessor. Many a franchise, whether corporate or not, may, in point of fact, be of no exchangeable value to the owners, and yet they are grants within the meaning and protection of the constitution. All incorporeal hereditaments, as immunities, dignities, offices, and franchises, are rights deemed valuable in law,[1] and whenever they are the subject of a contract or grant, they are just as much within the reach of the constitution as any other grant. All corporate franchises are legal estates. They are powers coupled with an interest, and corporators have vested rights in their character as corporators. Upon this doctrine it was insisted, that the trustees of Dartmouth College had rights and privileges under the charter, of which they could not be devested by the legislature without their consent.

The act of the legislature did impair their rights, and vitally affect the interests of the college under the charter. If a grant of franchise be made to A, in trust for a special purpose, the grant cannot be revoked, and a new grant made to A, B, and C, for the same purpose, without violating the obligation of the first grant. If property be vested by grant in A and B, for the use of a general charity, or private eleemosynary foundation, the obligation of the grant is impaired, when the estate is taken from their exclusive management, and vested in them in common with ten other persons.

I have thus stated the substance of the argument of the Supreme Court in this celebrated case, and it contains one of the most full and elaborate expositions of the constitutional sanctity of contracts to be met with in any of the reports. The decision in that case did more than any other single act, proceeding from the authority of the United States, to throw an impregnable barrier around all rights and franchises derived from the grant of government; and to give solidity and inviolability to the literary,

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[1] Public offices have not in this country the character of grants; nor is there any contract with government respecting their tenure or emoluments within the protection of the constitution. Butler *v.* Pennsylvania, 10 How. U. S. 402; Conner *v.* Mayor, &c., of New York, 1 Seld. 285; Coffin *v.* State, 7 Porter (Ind.) 157.

charitable, religious, and commercial institutions of our country.[2]

419 * * The same prohibitory clause in the constitution came again under discussion in the case of *Green* v. *Biddle*. (*a*) It was observed by the court, that the objection to a law, on the ground of its impairing the obligation of contracts, could never depend upon the extent of the change which the law effects in it. Any deviation from its terms, by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are expressed, however minute or apparently immaterial in their effect upon the contract, or upon any part or parcel of it, impairs its obligation. To deny any remedy under a contract, or by burdening the remedy with new conditions and restrictions, to make it useless or hardly worth pursuing, is equally a violation of the constitution. (*b*) Upon this principle it is, that if a creditor

(*a*) 8 Wheaton, 1. 4 Miller (Louis.) 94 S. P. See, also, Bronson *v.* Kinzie, 1 How. U. S. 311.

(*b*) It seemed to be admitted, in the case of Bronson *v.* Kinzie, that there might be legitimate alterations of the remedy, if they did not seriously impair the remedy. Something to the same extent was said by Ch. J. Marshall, in Sturges *v.* Crowninshield; but the admission is rather dangerous, from its liability to misconstruction and abuse; and still more so is the language of the court in the case of Evans *v.* Montgomery, 4 Watts & Serg. 218. In the case of Woodfin *v.* Hooper, 4 Humph. (Tenn.) 13, it was held, that the right of the creditor to imprison a debtor, existing at the time of the formation of the contract, was no part of the contract, and that remedy might afterwards be repealed, and the defendant even discharged from prison, under an execution upon the contract. But to take away, by legislative act, the existing remedies for enforcing the obligation of the contract, so as to leave the creditor without redress, would be a mockery of justice, and repugnant to the constitution of the United States. The courts do not undertake to go so far, nor do they undertake to draw the line between remedies that may and remedies that may not be taken away. The danger is, that the permission may be used so as to abolish all efficient remedies — *Utor permisso — et demo unum, demo etiam unum; dum cadat.* It is unfortunate that the loose language, in some cases, of the Supreme Court of the United States has encouraged the state

[2] The general doctrine established in this case has led to a practice in some of the states of inserting in corporate charters an express provision subjecting them to repeal or alteration by the legislature. In New York the power to alter or repeal all future charters is reserved by the state constitution of 1846. Art. 8, sec. 1. And where such a power is reserved, whether in a state constitution, in a general statute under which corporations are organized, or in a special charter, it is deemed a part of the contract between the state and the corporation, so as to withdraw the latter from the protection of the federal constitution. *In re* Oliver Lee & Co.'s Bank, 21 N. Y. 9. See, also, *In re* Reciprocity Bank, 22 N. Y. 9.

agrees with his debtor to postpone the day of payment, or in any other way to change the terms of the contract, without the con-

legislatures to deal in discretion with lawful remedies existing when contracts were made.[1] The better doctrine is, that all effectual remedies affecting the interests and rights of the owner, existing when the contract was made, become an essential ingredient in it, and are parcel of the creditor's right, and ought not to be disturbed. The constitution of New Jersey of 1844, (art. 4, sec. 7,) declares, that the legislature shall not deprive a party of any remedy for enforcing a contract which existed when the contract was made. This is a wise provision, giving additional and material securities to the sanctity and efficacy of contracts. All suspension by statute of remedies, or any part thereof, existing when the contract was made, is more or less impairing its obligation. The true doctrine of the constitution on this subject is to be found in Bronson *v.* Kinzie, McCracken *v.* Haywood, and Lancaster Saving Institution *v.* Reizart, *infra*, vol. iv. p. 434, n. *a*. In the case of Chadwick *v.* Moore, 8 Watts & Serg. 49, it was held, that a statute of Pennsylvania, in 1842, suspending for a year a sale on execution for less than two thirds of the appraised value, was not unconstitutional. Mr. Ch. J. Gibson, who delivered the opinion of the court, seemed to hold, that a temporary restraint on the remedy, when not to an unreasonable degree, was within the sound discretion of the legislature, and he preferred such a qualified doctrine to one that went for the absolute integrity of the constitutional principle in the entire existing remedy. *Vide infra*, pp. 455, 456. And see James *v.* Stull, 9 Barb. (N. Y.) 482. Baugher *v.* Nelson, 9 Gill, 299. Stocking *v.* Hunt, 3 Denio, 274. Smith *v.* Morse, 2 Cal. 524. The sounder state doctrine, as it seems to me, is that declared by Ch. J. Bronson, in the case of Quackenbush *v.* Danks, 1 Denio, 128; for, as he observes, laws which in form go only to the remedy, may have the practical effect of nullifying the contract.[2]

[1] The rights of the states to regulate and modify the remedies upon contracts, has been again affirmed in the Supreme Court of the United States. In The Bank of the State of Alabama *v.* Dalton, 9 How. U. S. 522, it was held, that a state law, enacting that all judgments which had been obtained in any other state prior to its passage, should be barred, unless suit was brought upon the judgment within two years, was declared to relate solely to the remedy, and to be valid. The principle has been affirmed under a variety of circumstances in the state courts. Newton *v.* Tibbatts, 2 Eng. 150. Bronson *v.* Newberry, 2 Doug. (Mich.) 38. Rockwell *v.* Hubbell, 2 Doug. (Mich.) 197. This last case carries the doctrine to an extreme, for it decides that an exemption of a part of the debtor's property from payments of his debts merely affects the remedy. See, also, Tarpley *v.* Hamer, 9 Smedes & Marsh. 310. Bruce *v.* Schuyler, 4 Gilm. 221.

In Howard *v.* Bugbee, 24 How. U. S. 461, the sound doctrine is reaffirmed. It was there held, that a statute of Alabama which authorized the redemption of mortgaged premises in two years after a sale under a decree, by *bonâ fide* creditors of the mortgagor, was void as to sales made under mortgages executed prior to the enactment of the statute.

[2] In the Court of Appeals, the doctrine of Quackenbush *v.* Danks was left undisturbed upon an equal division of the court. See Danks *v.* Quackenbush, 1 Comst. 129. It had been held in the former case, that a statute exempting certain property from levy on execution should not operate retrospectively so as to affect the remedies for debts contracted before its passage.

But in Morse *v.* Goold, 1 Kernan, 281, a case arising upon the same statute, it was

sent of the surety, the latter is discharged, although the change was for his advantage.[3]

The material point decided in that case was, that a compact between two states was a contract within the constitutional prohibition. The terms contract and compact were synonymous; and a contract is an agreement of two or more parties to do or not to do certain acts. The court declared, that the doctrine had been already announced and settled, that the constitution embraced all contracts executed and executory, and whether between individuals, or between a state and individuals; and that a state had no more power to impair an obligation in which she herself had entered, than she had to impair the contracts of individuals.[4]

Another case, which led to a very extensive inquiry into the operation and effect of the constitutional prohibition upon the states not to pass laws impairing the obligation of contracts, was that of *Sturges* v. *Crowninshield.*(*c*) The defendant was sued in one of the federal courts upon two promissory notes, given in March, 1811, and he pleaded his discharge under an insolvent * 420 act of New York, passed in April, * 1811. This insolvent

(*c*) 4 Wheaton, 122.

held, that it should apply to all cases, whether the debt, upon which execution issues, accrued before or after its enactment. For the act only modifies the remedy without impairing its efficiency. And in Conkey *v.* Hart, 4 Kernan, 23, it was held, that the act abolishing distress for rent is effectual to take away the right of distress in a lease made before the statute, providing expressly that the lessor might distrain. And that although the state was bound to provide some remedy for the lessor, still it might take away the particular remedy of distress. (Two of the judges, Selden and T. A. Johnson, dissented.)

In Thorne *v.* San Francisco, 4 Cal. 127, it was held that the suspension by statute of remedies or any part thereof, existing when the contract was made, more or less impairs the obligation of the contract, and is unconstitutional.

And each state has the right to legislate upon the remedy in suits on judgments of other states. Bacon *v.* Howard, 20 How. U. S. 22.

[3] Where a bank was chartered with power to receive money on deposit, and pay away the same, &c., and to discount bills of exchange and notes, and make loans, &c., and while in the exercise of these powers an act was passed by the legislature, making it unlawful for any bank in the state to transfer, by indorsement or otherwise, any note, bill receivable, or other evidence of debt, it was held that the act was void, as a violation of the contract made by the state with the bank in the granting of its charter. It would also, it seems, be a violation of the contract between the makers of the notes and the bank. Planters' Bank *v.* Sharp, Baldwin *v.* Payne, 6 How. U. S. 301, 326, 327, 332.

[4] The obligation of a contract cannot be impaired by the constitution of a state any more than by an act of its legislature. Dodge *v.* Woolsey, 18 How. U. S. 331.

act was retrospective, and discharged the debtor upon his single petition, and upon his surrendering his property in the manner therein prescribed, without the concurrence of any creditor, from all his pre-existing debts, and from all liability and responsibility by reason thereof.

The chief justice, in the opinion which he delivered on behalf of the court, admitted, that until Congress exercised the power to pass uniform laws on the subject of bankruptcy, the individual states may pass bankrupt laws, provided those laws contain no provision violating the obligation of contracts. It was admitted, that the states might by law discharge debtors from imprisonment, for imprisonment was no part of the contract, but only a means of coercion. It was also admitted, that they might pass statutes of limitation, for such statutes relate to the remedy, and not to the obligation of the contract. (*a*) It was further stated by the court, that the insolvent laws of far the greater number of the states only discharged the person of the debtor, and left the obligation to pay in full force, and to this the constitution was not opposed. But a law which discharged the debtor from his contract to pay a debt by a given time, without performance, and released him without payment, entirely from any future obligation to pay, impaired, because it entirely discharged the obligation of that contract, and, consequently, the discharge of the defendant, under the act of 1811, was no bar to the suit.[1]

The court held, that the obligation of a contract was not fulfilled by a *cessio bonorum*, for the parties had not merely in view the property in possession when the contract was made, but its obligation extended to future acquisitions; and to release them from being liable impaired the obligation of the contract. There was a distinction, in the nature of things, between the obligation of a contract, and the remedy to enforce that obligation, and

(*a*) In the case of Bumgardner *v.* Circuit Court, 4 Missou. 50, it was decided, that a statute directing a stay of execution on judgments was unconstitutional, both as it regarded the constitution of Missouri and of the United States.

[1] A ground of defence, however, to an action on contract resting on a statute founded in public policy may be taken away by a repeal of the statute. Washburn *v* Franklin, 35 Barb. (N. Y.) 599. So it is held in Connecticut that a statute validating certain usurious contracts previously made, and which under a statute relating to usury were partly void, is not unconstitutional or invalid. Savings Bank *v.* Allen, 28 Conn. 97.

the latter might be modified, as the wisdom of the legislature should direct. But the constitution intended to restore
* 421 and preserve public * confidence completely. It intended to establish a great principle, that contracts should be inviolable.

The case in which this decision was made was one in which the contract was existing when the law was passed; and the court said that their opinion was confined to the case. A distinction has been taken between the case of a contract made before, and one made after, the passing of the act. It was taken by the Supreme Court of New York, in *Mather* v. *Bush*, (*a*) and by the Chief Justice of Massachusetts, in *Blanchard* v. *Russell*, (*b*) and was relied on as a sound distinction by the Court of Chancery of New York, in *Hicks* v. *Hotchkiss*. (*c*) The doctrine of these cases is, that an insolvent act in force when the contract was made, did not, in the sense of the constitution, impair the obligation of that contract, because parties to a contract have reference to the existing laws of the country where it is made, and are presumed to contract in reference to those laws. It is an implied condition of every contract, that the party shall be absolved from its performance if the event takes place which the existing law declares shall dispense with the performance. The decision in *Sturges* v. *Crowninshield* is supposed to be consistent with that distinction, when it establishes the principle, that an insolvent act, discharging a debtor from his contract existing when the law passed, so that his future acquisitions could not be touched, is unconstitutional, and the discharge obtained under it void.

But the Supreme Court of the United States, in *M'Millan* v. *M'Neill*, (*d*) went a step further, and held, that a discharge under a state insolvent law existing when the debt was contracted, was equally a law impairing the obligation of contracts, and equally within the principle declared in *Sturges* v. *Crowninshield*. This was a discharge under the insolvent law of a different government from that in which the contract was made. It remains yet to be settled, whether it be lawful for a state to pass an insolvent
* 422 law, * which shall be effectual to discharge the debtor from a debt contracted after the passing of the act, and contracted within the state making the law. The general language

(*a*) 16 Johns. 233.
(*b*) 13 Mass. 1.
(*c*) 7 Johns. Ch. 297.
(*d*) 4 Wheaton, 209.

of the court would seem to reach even this case; but the facts in these cases decided do not cover this ground, and the cases decided are not authority to that extent. (*a*) It will be perceived, that the power of the states over this subject is, at all events, exceedingly narrowed and cut down; and, as the decisions now stand, the debt must have been contracted *after* the passing of the act, and the debt must have been contracted *within* the state, and between citizens of the state, or else a discharge will not extinguish the remedy against the future property of the debtor. (*b*)

(*a*) In the case of Bronson *v.* Kinzie, 1 How. U. S. 311, it was conceded, that contracts made subsequent to the stay-laws of Illinois were to be governed by them, if made to be executed in the state; for every state may prescribe the legal and equitable obligations of a contract to be made and executed within it.

(*b*) In Smith *v.* Parsons, 1 Ham. 107, and in Hempstead *v.* Read, 6 Conn. 480, the power of the states over contracts was understood and declared to be confined within the precise limits mentioned in the text. See, also, vol. ii. pp. 392, 393. The result of the decisions, says Judge Story, (3 Comm. Const. U. S. 15, 256,) is, that state insolvent laws lawfully apply, (1.) to all contracts made within the state, between citizens of the state; (2.) they do not apply to contracts made within the state, between a citizen of the state and a citizen of another state; (3.) nor to contracts not made within the state; and the contracts so protected are equally so from prospective as well as retrospective legislation.[1] But if a creditor out of the state voluntarily makes himself a party to the proceedings under the insolvent law of the state, and accepts a dividend, he is bound by his own act, and is deemed to have waived his extra-territorial immunity. In Satterlee *v.* Matthewson, 2 Peters U. S. 380, the Supreme Court of the United States held, that no part of the constitution of the United States applied to *a state law which devested rights which were vested by law in an individual*, provided its effects be not to impair the obligation of a *contract*. It was further held, that *retrospective laws* were not within the constitutional prohibition, provided they did not impair the obligation of *contracts*, or partake of the character of *ex post facto* laws. It has also been decided that a state government may tax state banks, *eo nomine*, at discretion, and that it would not be a violation of the contracts creating the banks, for no contract was to be implied not to impose such a tax. Providence Bank *v.* Billings, 4 Peters U. S. 514. It has been adjudged in Louisiana and Mississippi, that a state law requiring a bank to receive at par its own notes, though under par in the market, in payment of debts due to it, is constitutional. 12 Rob. (Louis.) 125; 3 Smedes & Marsh. 665.[2]

[1] Upon a review of the cases decided in the Supreme Court of the United States, it is the opinion of the court, in Marsh *v.* Putnam, 3 Gray, 551, that the result of the decisions is too broadly stated by Mr. Justice Story. See pp. 563, 564.

In this case it is held, that "a certificate of discharge under the insolvent laws of Massachusetts is a bar to an action on a contract between two citizens of that state, though made and to be performed in another state." See, too, Scribner *v.* Fisher, 2 Gray, 43.

[2] A statute, making the stockholders liable for the debts of the corporation, is valid in respect to debts subsequently contracted, and binding on one becoming a member after the passage of the act. Stanley *v.* Stanley, 26 Maine, 191.

Cessio bonorum.

And while on this point, it may not be amiss to observe, that the *cessio bonorum* of the Roman law, introduced by Julius Cæsar, and which prevails at present in most parts of the continent of Europe, only exempted the person of the debtor from imprisonment. It did not release or discharge the debt, nor exempt the future acquisitions of the debtor from execution for the debt. (*c*) The English statute of 32 Geo. II., commonly called the Lords' Act, and the more recent English statutes of 33 Geo. III., 1 Geo. IV., 3 Geo. IV., and 5 Geo. IV. have gone no
*423 further than to discharge the debtor's person; * and it may be laid down as the law of Germany, France, Holland, Scotland, England, &c., that insolvent laws are not more extensive in their operation than the *cessio bonorum* of the civil law. (*a*) In many parts of Germany, as we are informed by Huberus and Heineccius, (*b*) a *cessio bonorum* does not even work a discharge of the debtor's person, and much less of his future property. The cession under the Roman law did not extend to protect the debtor from personal responsibility, for penalties accruing on the commission of crimes. *Si in ære non habeat, in pelle luit.* But in Germany the *cessio bonorum* has the severe operation of depriving the insolvent of his remedy for a personal trespass, committed prior to the cession, so far as pecuniary compensation is in question. (*c*)

No state can pass naturalization laws.

(5.) *No state can pass naturalization laws.*

By the constitution of the United States, Congress have power to establish a uniform rule of naturalization. It was held, in the Circuit Court of the United States, in Philadelphia, in 1792, in *Collet* v. *Collet*, (*d*) that the state governments still enjoy a concurrent authority with the United States upon the subject of naturalization, and that though they could not contravene the rule established by Congress, or "exclude those citizens

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(*c*) According to the Spanish law, (Partidas, l. 3, tit. 15, part 5,) the debtor's property, acquired subsequently to the *cessio bonorum*, was only liable so far as it exceeded the amount necessary for his support. But the law of Louisiana contains no such exception. 3 Martin (Louis.) 588. 4 Ibid. 292, 293.

(*a*) Code, 7, 71, 1; Dig. 42, 3, 4, and 6; Voet, ad Pand. 42, 3, 8; Heineccii Opera, tom. v. p. 620; tom. vi. pp. 384, 387; Code de Commerce, No. 568. Répertoire Universel et Raisonné de Jurisprudence, par Merlin, tit. Cession de Biens; Esprit des Lois, tom. i. 114; 2 Bell's Comm. 580–597; 16 Johns. 244, note.

(*b*) Hub. Prælec. tom. ii. 1454; Heinec. Elem. Jur. Civ. secund. ord. Pand. pp. 6, 1, 42, tit. 3; Elem. Jur. Ger. lib. 2, tit. 13, sec. 387.

(*c*) Voet, ad Pand. 42, 3, 10.

(*d*) 2 Dallas, 294.

who had been made such by that rule, yet that they might adopt citizens upon easier terms than those which Congress may deem it expedient to impose." But though this decision was made by two of the judges of the Supreme Court, with the concurrence of the district judge of Pennsylvania, it is obvious that this opinion * was hastily and inconsiderately declared. If the *424 construction given to the constitution in this case was the true one, the provision would be, in a great degree, useless, and the policy of it defeated. The very purpose of the power was exclusive. It was to deprive the states individually of the power of naturalizing aliens according to their own will and pleasure, and thereby giving them the rights and privileges of citizens in every other state. If each state can naturalize upon one year's residence, when the act of Congress requires five, of what use is the act of Congress, and how does it become a uniform rule?

This decision of the Circuit Court may be considered as, in effect, overruled. In the same Circuit Court, in 1797, Judge Iredell intimated, that if the question had not previously occurred, he should be disposed to think that the power of naturalization operated exclusively, as soon as it was exercised by Congress. (*a*) And in the Circuit Court of Pennsylvania, in 1814, it was the opinion of Judge Washington, that the power to naturalize was exclusively vested in Congress. (*b*) Afterwards, in *Chirac* v. *Chirac*, (*c*) the Chief Justice of the United States observed, that it certainly ought not to be controverted, that the power of naturalization was vested exclusively in Congress. In *Houston* v. *Moore*, (*d*) Judge Story mentioned the power in Congress to establish a uniform rule of naturalization as one which was exclusive, on the ground of there being a direct repugnancy or incompatibility in the exercise of it by the states. The weight of authority, as well as of reason, may, therefore, be considered as clearly in favor of this latter construction.[1]

(*a*) United States *v.* Villato, 2 Dallas, 370.
(*b*) Golden *v.* Prince, 3 Wash. C. C. 313.
(*c*) 2 Wheaton, 269.
(*d*) 5 Wheaton, 49.

[1] The obscurity on this subject will be removed by attending to the distinction between local rights of citizenship within a state and citizenship of the United States according to the constitution. Undoubtedly citizenship at large in the sense of the constitution can be conferred on a foreigner only by the naturalization laws of Congress. But each state, in the exercise of its local and reserved sovereignty, may place foreign-

* 425 * (6.) *The states cannot impose a tax on the national bank or its branches, or on national stock.*

No state can tax a national bank or stock.

The inability of the states to impede or control, by taxation or otherwise, the lawful institutions and measures of the national government, was largely discussed and strongly declared in the case of *M' Culloch* v. *The State of Maryland.* (*a*) In that case the State of Maryland had imposed a tax upon the Branch Bank of the United States established in that state, and, assuming the bank to be constitutionally created and lawfully established in that state, the question arose on the validity of the state tax. It was adjudged that the state governments had no right to tax any of the constitutional means employed by the government of the Union to execute its constitutional powers, nor to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress, to carry into effect the powers vested in the national government.

To define and settle the bounds of the restriction of the power of taxation in the states, and especially when that restriction was deduced from the implied powers of the general government, was a great and difficult undertaking; but it appears to have been, in this instance, most wisely and most successfully performed. It was declared by the court, that it was not to be denied that the power of taxation was to be concurrently exercised by the two governments; but such was the paramount character of the constitution of the United States, that it had a capacity to withdraw any subject from the action even of this power; and it might restrain a state from any exercise of it which may be incompatible with, and repugnant to, the constitutional laws of the Union. The great principle that governed the case was, that the constitution, and the laws made in pursuance thereof, were supreme, and that they controlled the constitution and laws of the respective
* 426 states, and could not be controlled * by them. It was of

(*a*) 4 Wheaton, 316.

ers or other persons on a footing with its own citizens, as to political rights and privileges to be enjoyed within its own dominion. But state regulations of this character do not make the persons on whom such rights are conferred citizens of the United States or entitle them to the privileges and immunities of citizens in another state. Dred Scott's case, 19 How. (U. S.) 393.

the very essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their influence. A supreme power must control every other power which is repugnant to it. The right of taxation in the states extends to all subjects over which its sovereign power extends, and no further. The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but it does not extend to those means which are employed by Congress to carry into execution their constitutional powers. The power of state taxation is to be measured by the extent of state sovereignty, and this leaves to a state the command of all its resources, and the unimpaired power of taxing the people and property of the state. But it places beyond the reach of state power all those powers conferred on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. This principle relieves from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve. The power to tax would involve the power to destroy, and the power to destroy might defeat and render useless the power to create. There would be a plain repugnance in conferring on one government the power to control the constitutional measures of another, which other, with respect to those very measures, was declared to be supreme over that which exerts the control. If the right of the states to tax the means employed by the general government did really exist, then the declaration that the constitution and the laws made in pursuance thereof should be the supreme law of the land, would be empty and unmeaning declamation. If the states might tax one instrument employed by the government in the execution of its powers, they might tax * every other instrument. They * 427 might tax the mail; they might tax the mint; they might tax the papers of the custom-house; they might tax judicial process; they might tax all the means employed by the government, to an excess which would defeat all the ends of government.

The claim of the states to tax the Bank of the United States was thus denied, and shown to be fallacious; and that there was a

manifest repugnancy between the power of Maryland to tax, and the power of Congress to preserve, the institution of the Branch Bank. A tax on the operations of the bank was a tax on the operations of an instrument employed by the government of the Union to carry its powers into execution, and was consequently unconstitutional. A case could not be selected from the decisions of the Supreme Court of the United States, superior to this one of *M'Culloch* v. *The State of Maryland*, for the clear and satisfactory manner in which the supremacy of the laws of the Union have been maintained by the court, and an undue assertion of state power overruled and defeated.

But the court were careful to declare that their decision was to be received with this qualification, — that the states were not deprived of any resources of taxation which they originally possessed, and that the restriction did not extend to a tax paid by the real property of the bank, in common with the real property within the state; nor to a tax imposed upon the interest which the citizens of Maryland might hold in that institution, in common with other property of the same description throughout the state. (*a*)

The decision pronounced in this case against the validity of the Maryland tax was made on the 7th of March, 1819; and it was on the 7th of February preceding that the legislature of the state of Ohio imposed a similar tax, to the amount of fifty thousand dollars annually, on the Branch Bank of the United States established in that state. Notwithstanding this decision, the officers of the state of Ohio proceeded to levy the tax, and that act brought up before the Supreme Court a renewed discussion and consid-
* 428 eration of the legality * of such a tax. (*a*) It was attempted to withdraw this case from the influence and authority of the former decision, by the suggestion that the Bank of the United States was a mere private corporation, engaged in its own business, with its own views, and that its great end and principal object

(*a*) In Berney *v.* Tax Collector, 2 Bailey (S. C.) 654, a state tax on dividends arising from stock in the Bank of the United States, owned by a citizen of the state, was adjudged to be constitutional. And in the case of the Union Bank *v.* The State, 9 Yerger, 490, it was held, that state bank stock, as individual property, might be taxed, when owned by residents of the state; but that the stock held by non-resident stockholders was not subject to the taxing power of the state, for it must be a tax *in personam*, and stock is a chose in action, and has no locality, and follows the person of the owner.

(*a*) Osborn *v.* Bank of the United States, 9 Wheaton, 738.

were private trade and private profit. It was admitted, that if that were the case, the bank would be subject to the taxing power of the state, as any individual would be. But it was not the case. The bank was not created for its own sake, or for private purposes. It has never been supposed that Congress could create such a corporation. It was not a private, but a public corporation, created for public and national purposes, and as an instrument necessary and proper for carrying into effect the powers vested in the government of the United States. The business of lending and dealing in money for private purposes was an incidental circumstance, and not the primary object; and the bank was endowed with this faculty, in order to enable it to effect the great public ends of the institution, and without such faculty and business the bank would want a capacity to perform its public functions. And if the trade of the bank was essential to its character as a machine for the fiscal operations of the government, that trade must be exempt from state control, and a tax upon that trade bears upon the whole machine, and was, consequently, inadmissible, and repugnant to the constitution. In *Weston* v. *The City Council of Charleston*, (*b*) it was decided, that a state tax on stock issued for loans made to the United States was unconstitutional. The court considered it to be a tax on the power given to Congress to borrow money on the credit of the United States, and thereby to diminish the means of the United States used in the exercise of its powers, and that it was, consequently, repugnant to the constitution. By declaring the powers of the general government supreme, the constitution has shielded its action in the * exercise of its powers, * 429 from any restraining or controlling action of the local governments. (*a*) [1]

(*b*) 2 Peters U. S. 449.

(*a*) A decision upon the same principle was made in the case of Dobbins *v.* The Commissioners of Erie County, 16 Peters U. S. 435, where it was held, that an officer of the United States was not liable to be rated and assessed *for his office* by state rates and levies: for this would be to diminish the recompense secured by law to the officer. In the case of Melcher *v.* The City of Boston, in the Sup. Judicial Court of Massachusetts, March, 1845, 9 Metcalf, 73, it was stated as a question undecided, whether a tax assessed upon *the income* of an officer of the United States would not be lawful, and not within the case of Dobbins. It was decided in the Massachusetts case, that a *clerk in a post-office* was not an officer exempted from taxation of his income.

[1] The New York Court of Appeals recently decided, in Bank of the Commonwealth *v.* Commissioners of Taxes, 23 N. Y. 192, that the stock or public debt of the United

Places ceded to the United States.

(7.) *The state governments have no jurisdiction in places ceded to the United States.*

The state governments may likewise lose all jurisdiction over places purchased by Congress, by the consent of the legislature of the state, for the erection of forts, dock-yards, light-houses, hospitals, military academies, and other needful buildings. (*b*) The question which has arisen on the subject was as to the effect of the proviso or reservation, usually annexed to the consent of the state, that all civil and criminal process, issued under the authority of the state, might be executed on the lands so ceded, in like manner as if the cession had not been made. This point was much discussed in the Circuit Court of the United States in Rhode Island, in the case of *The United States* v. *Cornell.* (*c*) It was held that a purchase of lands within the jurisdiction of a state, with the consent of the state, for the national purposes contemplated by the constitution, did, *ipso facto*, by the very terms of the constitution, fall within the exclusive legislation of Congress, and that the state jurisdiction was completely ousted. What, then, is the true intent and effect of the saving clause annexed to the cessions? It does not imply the reservation of any concurrent jurisdiction or legislation, or that the state retained a right to punish for acts done within the ceded lands. The whole apparent object of the proviso was to prevent the ceded lands from becoming a sanctuary for fugitives from justice, for acts done within the acknowledged jurisdiction of the state; and such permission to execute process is not incompatible with exclusive sovereignty and jurisdiction. The acceptance of a cession, with this reservation, amounts to an agreement of the new sovereign to permit the free exercise of

(*b*) Const. art. 1, sec. 8.

(*c*) 2 Mason, 60, 91; United States *v.* Davis, 5 Ibid. 356, S. P.

States, whether held by corporations or by individuals, was liable to taxation under the laws of the state. By the statutes of that state property is assessed for taxation in mass and not by any enumeration or specification of the items which compose the taxpayer's estate. This was the ground of distinction suggested in the prevailing opinion of Judge Denio between this case and that of Weston *v.* The City of Charleston. The public stocks of the Union were held taxable in common with the mass of property in the state, the mode of assessment being such that no unfriendly discrimination as to that species of property was possible. The Chief Judge dissented. The question was carried for review to the Supreme Court of the United States, where the decision was reversed and the doctrine affirmed that the stocks of the United States government cannot be reached by state taxation. 2 Black, 620.

such process, * as being *quoad hoc* his own process. This *430
construction has been frequently declared by the courts of the United States, and it comports entirely with the intention of the parties; and upon any other construction the cession would be nugatory and void. Judge Story doubted whether Congress were even at liberty, by the terms of the constitution, to purchase lands with the consent of a state, under any qualification of that consent, which would deprive them of exclusive legislation over the place. The courts of the United States have sole and exclusive jurisdiction over an offence committed within a ceded place, notwithstanding the ordinary reservation of the right to execute civil and criminal process of the state. That was no reservation of any sovereignty or jurisdiction.

Congress, in exercising powers of exclusive legislation over a ceded place or district, unite the powers of general with those of local legislation. The power of local legislation carries with it, as an incident, the right to make that power effectual. Congress exercises that particular local power, like all its other powers, in its high character as the legislature of the Union; and its general power may come in aid of these local powers. It is, therefore, competent for Congress to try and punish an offender for an offence committed within one of those local districts, in a place not within such jurisdiction; or to provide for the pursuit and arrest of a criminal escaping from one of those districts after committing a felony there; or to punish a person for concealing, out of the district, a felony committed within it. All these incidental powers are necessary to the complete execution of the principal power; and the Supreme Court, in *Cohens* v. *Virginia*, (*a*) held, that they were vested in Congress.

It follows, as a consequence, from this doctrine of the federal courts, that state courts cannot take cognizance of any * offences committed within such ceded districts; and, on *431
the other hand, that the inhabitants of such places cannot exercise any civil or political privileges under the laws of the state, because they are not bound by those laws. This has been so decided in the state courts. (*a*) But if, in any case, the United States have not actually purchased, and the state has not, in point

(*a*) 6 Wheaton, 426 – 429.

(*a*) Commonwealth *v.* Clary, 8 Mass. 72; Same *v.* Young, 1 Hall's Journal of Jurisprudence, 53.

of fact, ceded the place or territory to the United States, its jurisdiction remains, notwithstanding the place may have been occupied, ever since its surrender by Great Britain, by the troops of the United States, as a fort or garrison. The Supreme Court of New York accordingly held, in the case of *The People* v. *Godfrey*, (*b*) that they had jurisdiction of a murder committed by one soldier upon another within Niagara fort. Nor would the purchase of the land by the United States be alone sufficient to vest them with the jurisdiction, or to oust that of the state, without being accompanied or followed with the consent of the legislature of the state. This was so decided in the case of *The Commonwealth of Pennsylvania* v. *Young*, (*c*)

Power to regulate commerce.

(8.) *The construction of the power of Congress to regulate commerce among the several states.*

I proceed next to examine the judicial decisions under the power given to Congress to "regulate commerce with foreign nations, and among the several states"; and it will be perceived, that the questions arising under this power have been of the utmost consequence to the interests of the Union, and the residuary claims and sovereignty of the states.

The first question that arose upon this part of the constitution

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(*b*) 17 Johns. 225.

(*c*) 1 Hall's Journal of Jurisprudence, 47. The jurisdiction of the United States over the lands within places ceded by a state was fully and learnedly examined by Mr. Justice Woodbury, in the Circuit Court of the United States in Massachusetts, in October, 1845, in the case of the United Sates *v.* Ames, 1 Wood. & Minot, 76. It was adjudged, that if the United States own lands in any state, and there be no cession of the jurisdiction, the *lex rei sitæ* applicable to the land-owners of the state, governs, as to rights and remedies, equally applying to non-residents and citizens, when the laws of Congress have not otherwise provided; such, for instance, is the case under an analogous principle, when the United States are the holders of a bill of exchange, United States *v.* Barker, 12 Wheaton, 561, and when liable to damages on foreign bills of exchange, as, see *supra*, p. 297; and as to liability to general average. See *infra*, vol. iii. p. 171, *a*; and as to alluvions and land deposits, 10 Peters U. S. 662, 717; and as to set-off, see *supra*, p. 297. But if the ceded lands have been accompanied with a cession of the jurisdiction, the lands are subject to the laws of Congress, and not to those of the state; and those state laws cannot be permitted to thwart or embarrass the object of the cession by taxes, or by overflowing the land with water, or otherwise in any degree to conflict with what is required or provided by the general government of the United States, which may punish offences and trespasses, and remove intruders thereon. On the other hand, if Congress have not provided any adequate and exclusive remedy for injuries to public property, then the common law or laws of the states apply. But the United States have jurisdiction over *its territory*, though the particular lands have not been ceded, inasmuch as the lands are held for special purposes, and are to be protected.

was, respecting the power of Congress to interrupt or destroy the commerce of the United States, by laying a general embargo, without any limitation as to time. By the act * of * 432 Congress of 22d December, 1807, an embargo was laid on all ships and vessels in the ports and harbors of the United States, and a prohibition of exportation from the United States, either by land or water, of any goods, wares, or merchandise, of foreign or domestic growth or manufacture. There were several supplementary acts auxiliary to this principal one, and intended more effectually to enforce it, under certain specific exceptions. In the case of *The United States* v. *The Brigantine William*, in the District Court of Massachusetts, in September, 1808, (*a*) it was objected that the act was unconstitutional, for that Congress had no right, under the power to regulate commerce, thus to annihilate it, by interdicting it entirely with foreign nations. But the court decided that the Embargo Act was within the constitutional provision. The power of Congress was sovereign relative to commercial intercourse, qualified by the limitations and restrictions expressed in the constitution; and by the treaty-making power of the President and Senate, Congress had a right to control or abridge commerce for the advancement of great national purposes. Non-intercourse and embargo laws are within the range of legislative discretion; and if Congress have the power, for purposes of safety, or preparation, or counteraction, to suspend commercial intercourse with foreign nations, they are not limited as to the duration, more than as to the manner and extent of the measure. (*b*) [1]

A still graver question was presented for the consideration of the federal judiciary, in the case of *Gibbons* v. *Ogden*, (*c*) [2] de-

(*a*) 2 Hall's Amer. Law Journal, 255.

(*b*) Mr. Justice Story says, that the measure of a general embargo, indefinite as to time as that laid in 1807, went to the utmost verge of implied constitutional power. Commentaries, vol. iii. p. 163.

(*c*) 9 Wheaton, 1.

[1] Under the power to regulate commerce, Congress can exclude, either partially or wholly, anything falling within the legitimate sphere of commercial regulation; and under the power to coin money, and regulate the value thereof, Congress can protect the national coin. The act of the 3d of March, 1825, (4 Stat. at Large, 121,) for the punishment of persons who shall bring into the United States, with intent to pass, any counterfeit coin, and also for the punishment of any persons who shall pass, &c., such coin, is therefore valid. The United States *v.* Marigold, 9 How. U. S. 560.

[2] State of Pennsylvania *v.* Wheeling Bridge Co. 13 How. U. S. 518. Where a river

cided by the Supreme Court of the United States, in February term, 1824. That decision went to declare, that several acts of the legislature of New York, granting to Livingston and Fulton the exclusive navigation of the waters of the state in vessels propelled by steam, were unconstitutional and void acts, and
*433 repugnant to the power given to *Congress to regulate commerce, so far as those acts went to prohibit vessels licensed under the laws of Congress for carrying on the coasting trade, from navigating the waters of New York.

It had been decided in the Court of Errors of New York, in 1812, (*a*) that five several statutes of the state, passed between the years 1798 and 1811, inclusive, and granting and securing to the plaintiffs the sole and exclusive right of using and navigating boats by steam, in the waters of the state, for a term of years, were constitutional and valid acts. According to the doctrine of the court in that case, the internal commerce of the state by land and water remained entirely and exclusively within the scope of its original sovereignty. It was considered to be very difficult to draw an exact line between those regulations which relate to external, and those which relate to internal commerce, for every regulation of the one will, directly or indirectly, affect the other. But it was supposed that there could be no doubt that the acts of the state, which were then under consideration, were not within any constitutional prohibition, for not one of the restrictions upon state power, contained in the 9th and 10th sections of the 1st article of the constitution, appeared to apply to the case; nor was there any existing regulation of Congress on the subject of commerce with foreign nations, and among the several states, which was deemed to interfere with the grant. It was declared to be a very inadmissible proposition, that a state was devested of a capacity to grant an exclusive privilege of navigating a steamboat within its own waters, merely because Congress, in the plenary exercise of its power to regulate commerce, *might* make some future regulation inconsistent with the exercise of that privilege. The grant was taken, undoubtedly, subject to such future commer-

(*a*) Livingston *v.* Van Ingen, 9 Johns. 507.

in the State of Maine, above tide water, and not navigable, had been improved by an individual to whom the state by law granted exclusive navigation, such law was held to be constitutional. Veazie *v.* Moore, 14 How. U. S. 568.

cial regulations as Congress might lawfully prescribe; and to what extent they might lawfully * prescribe them was admitted to be a question within the ultimate cognizance of the Supreme Court of the United States. The opinion of the court went no further than to maintain that the grant to Livingston and Fulton was not within any constitutional prohibition upon the states, nor was it repugnant or contradictory to any existing act of Congress on the subject of commerce; and under those two restrictions, every state had a right to make its own commercial regulations. It was generally declared, that Congress had not, in the understanding of the court, any direct jurisdiction over our interior commerce or waters; and that they had concurrent jurisdiction over our navigable waters, only so far as might be incidental and requisite to the due regulation of commerce between the states and with foreign nations. * 434

In this case, in 1812, the defendants, who objected to the validity of the state grant, did not set up any patent right, or any other right under any particular act of Congress. They rested entirely on the objection, that the statutes conferring the exclusive privilege were absolutely unconstitutional and void. But afterwards, in the case of *Ogden* v. *Gibbons*, (*a*) the defendant set up, by way of right and title to navigate a steamboat upon the waters of New York, in opposition to the grant, that his boats were duly enrolled and licensed under the laws of the United States, at Perth Amboy, in the State of New Jersey, to be employed in carrying on the coasting trade. The question in that case was, whether such a coasting license conferred any power to interfere with the grant; and it was decided in the Court of Chancery, and afterwards in the Court of Errors, (*b*) that the coasting license merely gave to the steamboat an American character for the purpose of revenue, and that it was not intended to decide a question of property, or to confer a right of property, or a right of navigation or commerce. * The act of Congress regulating the coasting trade was never intended to assert any supremacy over state regulations or claims, in respect to internal waters or commerce. It was not considered by our courts as the exercise of the power of Congress to regulate commerce among the states. The law concerning the coasting trade was passed on the 18th of February, * 435

(*a*) 4 Johns. Ch. 150. (*b*) 17 Johns. 488.

1793; and it never occurred to any one, during the whole period that the state laws were under consideration before the legislature, and in the council of revision, and in the courts of justice, from 1798 down to and including the judicial investigations in 1812, that the Coasting Act of 1793 was a regulation of commerce among the states prohibitory of any such grant. Such latent powers were never thought of, nor imputed to it. The great objects and policy of the Coasting Act were, to exclude foreign vessels from commerce between the states, in order to cherish the growth of our own marine, and to provide that the coasting trade should be conducted with security to the revenue. The register and enrolment of the vessel were to ascertain the national character; and the license was only evidence that the vessel had complied with the requisites of the law, and was qualified for the coasting trade under American privileges. The license did not define the coasting trade. Free trade between the states then existed, subject to local and municipal regulations. The requisitions of the Coasting Act were restrictions upon the general freedom of that commerce, and not the grant of new rights. Steam vessels were subject to those regulations equally with any other vessels. If Congress had intended that a coasting license should confer power and control, and a claim of sovereignty subversive of local laws of the states within their own jurisdictions, it was supposed they would have said so in plain and intelligible language, and not have left their claim of supremacy to be hidden from the observation and knowledge of the state governments, in the unpretending and harmless shape of a coasting license, obviously intended for other purposes.

*436 *It was, therefore, upon considerations like these, that the courts of justice in New York did not consider the grant to Livingston and Fulton as disturbed by a coasting license under the act of 1793. They did not, either in the case of *Ogden* v. *Gibbons*, or in any of the cases which preceded it, deny to Congress the power to regulate commerce among the states, by express and direct provision, so as to control and restrict the exercise of the state grant. They only insisted that, without some such explicit provision, the state jurisdiction over the subject remained in full force. This cause was afterwards carried up by appeal to the Supreme Court of the United States, and the decree reversed, on the ground that the grant was repugnant to the rights and privi-

leges conferred upon a steamboat navigating under a coasting license. (*a*)

In the construction of the power to regulate commerce, the court held, that the term meant not only traffic, but intercourse, and that it included navigation, and the power to regulate commerce was a power to regulate navigation. Commerce among the several states meant commerce intermingled with the states, and which might pass the external boundary line of each state, and be introduced into the interior. It was admitted, that the power did not extend to that commerce which was completely internal, and carried on between different ports of the same state, and which did not extend to or affect other states. The power was restricted to that commerce which concerned more states than one, and the completely internal commerce of a state was reserved for the state itself. The power of Congress on this subject comprehended navigation within the limits of every state; and it might pass the jurisdictional line of a state, and be exercised within its territory, so far as the navigation was connected with foreign commerce, or with commerce among the several states. This power, like all *the other powers of Congress, was plenary and abso- *437 lute within its acknowledged limits. But, it was admitted, that inspection laws relative to the quality of articles to be exported, and quarantine laws, and health laws of every description, and laws for regulating the internal commerce of a state, and those with respect to turnpike roads, ferries, &c., were component parts of an immense mass of legislation, not surrendered to the general government. Though Congress may license vessels to sail from one port to another in the same state, the act is supposed to be necessarily incidental to the power expressly granted to Congress, and it implies no claim of a direct power to regulate the purely internal commerce of a state, or to act directly on its system of police. The court construed the word *regulate* to imply full power over the thing to be regulated, and to exclude the actions of all others, that would perform the same operation on the same thing.

After laying down these general propositions, the court proceeded to observe that the acts of New York, granting exclusive privileges to certain steamboats, were in collision with the acts of

(*a*) Gibbons *v.* Ogden, 9 Wheaton, 1.

Congress regulating the coasting trade, and that the acts of the state must, in that case, yield to the supreme and paramount law. If the law of Congress was made in pursuance of the constitution, the state law must yield to the supremacy of it, even though they were enacted in pursuance of powers acknowledged to remain in the states. A license under the acts of Congress for regulating the coasting trade, was an authority to carry on that trade. The words of the act of Congress, directing the proper officer to grant to a vessel qualified to receive it, "a license for carrying on the coasting trade," was considered as conveying an explicit authority for that purpose. It was the legislative grant of a right, and it conferred all the right which Congress could give in the case, and it was not intended to confer merely the national character. It was further held, that the power to regulate commerce extended to navigation, carried on by vessels exclusively *employed in transporting passengers, and to vessels propelled by steam, as well as to vessels navigated by other means.

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This is the substance of the argument of the Supreme Court of the United States in the steamboat case. The only great point on which the Supreme Court of the United States and the courts of New York have differed, is in the construction and effect given to a coasting license. They did not differ in any general view of the powers of Congress; and the Supreme Court expressly waived any inquiry or decision on the point, whether the exercise of the power assumed by the steamboat laws would have been illegal, provided there was no existing regulation of Congress that came in collision with them. The decision in *Livingston* v. *Van Ingen* rested upon the assumption that there was no such regulation.[1]

The Court of Errors of New York, since the case of *Gibbons*

[1] In Sinnot *v.* Davenport, 22 How. U. S. 227, it was held, that a statute of Alabama requiring the owners of steamboats navigating the waters of the state, before leaving Mobile, to file a statement of the name of the vessel, and of the name, residence, and interest of each owner, was void as to a vessel licensed under the acts of Congress and engaged in the coasting trade. So the New York statutes regulating pilotage were adjudged inoperative by the Supreme Court of the city of New York, after the exercise by Congress of the power of legislation on the same subject. Cisco *v.* Roberts, 6 Bosw. 494. So also a statute of the State of California, imposing a stamp duty upon bills of lading for gold and silver transported out of the state, is void as a tax on exports. Almy *v.* California, 24 How. U. S. 169.

v. *Ogden*, have given to this constitutional power a very liberal extent, by the construction put upon a coasting trade. In that decision, the power to regulate commerce "among the several states" was supposed to be "very properly restricted to that commerce which concerns more states than one"; and that it did not "comprehend that commerce which was completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states." But in the case in New York alluded to, (*a*) the Court of Errors held, that the coasting trade meant, amongst other things, commercial intercourse carried on between different districts in the same state, and between different places in the same district, on the sea-coast, or on a navigable river; and that a voyage from New York to Albany
* was as much a coasting voyage, as from Boston to New * 439
Bedford. (*a*)

(*a*) Steamboat Company *v.* Livingston, 3 Cowen, 747. See, also, 1 Wendell, 560.

(*a*) This power in Congress to regulate "commerce among the several states" was well and ably discussed in the United States District Court in Missouri, in the case of The United States *v.* The Steamboat James Morrison, in 1846, (reported in the New York Legal Observer for September, 1846,) and the doctrine established in Gibbons *v.* Ogden was reviewed, illustrated, and enforced, with this qualification, not inconsistent with the principle of that leading case, viz.: that a steamboat employed only as a ferry-boat on the river Missouri, within the limits of the State of Missouri, was not bound to take out a license from an United States officer, under the act of Congress of 7th July, 1838. The power to regulate commerce with foreign nations and among the several states did not extend to a navigation so perfectly internal, and so totally disconnected from commerce out of the state. The license referred to was one to "carry on the coasting trade," and that ferry business had no connection with the coasting trade. It was admitted, however, that a coasting trade was not less part of commerce among the several states, though a vessel should only navigate from one port to another in the same state, up and down a navigable river, when such commerce was a connected and divisible part of one general commerce between and among two or more states. But there was an earlier decision, directly contrary to this, in Missouri, in the case of The United States *v.* Jackson, in the southern district of New York, in November, 1841, (N. Y. Legal Observer for December, 1846.) It was in that case adjudged, upon an elaborate discussion of the subject, that the act of Congress of 7th July, 1838, embraced all vessels of all descriptions, propelled wholly or in part by steam; and that steamboats require to be licensed or inspected, without regard to the business they follow, or the places they run between; and that steamboats wholly engaged on ferries within a state, and owned in such state, are within the requisition of the license law.[1]

[1] The regulation of the fares upon a ferry, by one of the states between which it communicates, is the legitimate exercise of a power reserved by the states. Freeholders of Hudson County *v.* The State, 4 Zabr. 718.

Under the power to regulate commerce, it has been further decided, (*b*) that a state law, requiring every importer of goods by wholesale, bale, or package, to take out a license, and pay for it, under certain penalties or forfeitures for neglect or refusal, was repugnant to the constitution of the United States, and void; inasmuch as it belonged to Congress to regulate foreign commerce, and no state can lay a duty on imports. But it was admitted in that case, that after the goods had become mixed with or incorporated into the general mass of the property of the state, they were liable to state taxation. (*c*) The restriction

(*b*) Brown *v.* State of Maryland, 12 Wheaton, 419. Wynne *v.* Wright, 1 Dev. & Batt. (N. C.) 19 S. P. See, also, the case of The People *v.* Huntington, N. Y. Legal Observer for May, 1846, p. 187. It was adjudged, in the Ontario Sessions, in New York, that a statute prohibiting the sale of spirituous liquors, to be drank in certain places, was not repugnant to the constitution of the United States; for that the power of Congress had no application to the purely internal commerce of a state, and was to be confined to the period of time during which the act of importation, introduction, and incorporation of a foreign commodity into the mass of the property of the state was going on. The principles involved in this case were drawn from the decisions of the federal courts, and I have referred to it principally on the ground of the clear and able condensation and review of the federal doctrine on the subject, by Judge Smith, who presided in that inferior jurisdiction.[2]

(*c*) In Cumming *v.* Corporation of Savannah, it was decided, by one of the superior courts of Georgia, in 1816, that a levy of a tax under a city ordinance, founded on a state law, on all goods not the produce of the state, and sold on commission, was lawful, as not being a duty on imports. R. M. Charlton, 26. It was further decided, in Green *v.* The City of Savannah, Ib. 368, that the right to tax imports as well as exports, for the purpose of executing *inspection* laws, resided in the states. So it has been decided that a state act imposing a duty on the retailers of foreign merchandise was not repugnant to the constitution of the United States, though the act applied as well to the *importer* as other sellers of foreign merchandise. Biddle *v.* The Commonwealth, 13 Serg. & Rawle, 405. But this decision may be considered as overruled by the decision in Brown *v.* State of Maryland, above mentioned, so far as it goes to

[2] The constitutionality of the state license laws has been finally settled in the Supreme Court of the United States, after great discussion, and the validity of these laws established. License Cases, (Thurlow *v.* Comm. of Massachusetts, Fletcher *v.* State of Rhode Island, Pierce *v.* State of New Hampshire,) 5 How. U. S. 504, 540, 554, 586, 597, 609. The license is alike constitutional and valid, whether it affects the sale of imported or domestic liquors. But the sale of the imported liquors *by the importer in the original casks* was not affected; if it had been, it seems the decision would have been otherwise. Pp. 576, 577. See City Council *v.* Ahrens, 4 Strobh. 241.

In Wynehamer *v.* The People, 13 N. Y. 378, the validity of a statute of New York designed by a series of penal provisions to effect the destruction of property and trade in intoxicating liquors was considered with reference to the constitution of the state, and the act was adjudged to be void as an unwarrantable confiscation of private property. But the act was not supposed to conflict with the power of Congress to regulate commerce or with the exercise of that power.

does not apply to goods imported and in the hands of the retail trader. In connection with this subject it may be further observed, that by the constitution of the United States, "no state shall, without the consent of Congress, lay any imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and all such laws shall be subject to the revision and control of Congress." (*d*) Inspection laws are not, strictly speaking, regulations of commerce.[3] Their object is to improve the quality of articles produced by the labor of the country, and to fit them for exportation or for domestic use. These laws act upon the subject before it becomes an article of commerce. Inspection laws, quarantine laws, and health laws, as well as laws for regulating the internal commerce of a state, are component parts of the immense mass of residuary state legislation, and over which Congress has no direct power, though it may be controlled when it directly interferes with their ac-

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prohibit the importer from selling the imported article *in bulk*, for the right to sell is inseparably connected with the law permitting importation.[4] The act of Pennsylvania, on which the decision in S. & R. was founded, was unexceptionable as it originally stood, without the supplementary amendment; for it contained an exception in favor of importers of goods, who sold them in the original bulk or package in which they were imported.[5]

(*d*) Constitution, art. 1, sec. 10. By act of Congress of 27th February, 1801, c. 83, the assent of Congress was declared to an act of the legislature of Maryland, appointing a health officer for the port of Baltimore, so far as to enable the state to collect a duty of one per cent per ton on all vessels coming into the district of Baltimore from a foreign voyage, for the purpose intended in the act. This act of Congress is evidence of the restricted sense given to the clause in the constitution cited in the text.

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[3] An act of Pennsylvania, requiring vessels to take a pilot, under a penalty, held to be constitutional. Cooley *v.* Board of Wardens, 12 How. U. S. 299. Tonnage duties cannot, however, be in any wise laid by a state. Alexander *v.* Wilmington R. R. Co. 3 Strobh. 594.

[4] In Padelford *v.* Mayor, &c., 14 Geo. 438, it is held that an ordinance imposing a tax on the "gross amount of the sales of merchandise," does not conflict with the clause of the constitution which prohibits states to lay imposts or duties on imports. Therefore the tax was lawfully levied upon the price of imported goods, sold by the importers in the original form.

[5] A tax, imposed by a state upon all money or exchange brokers, is not void for repugnance to the constitutional power of Congress to regulate commerce. Nathan *v.* Louisiana, 8 How. U. S. 73. Nor is a tax void, which is exacted from the agents of foreign insurance companies. People *v.* Thurber, 13 Ill. 554. Nor is a state law, laying a *pro rata* tax upon the sum received by any person, not domiciliated in the state, nor being a citizen of any state or territory of the Union, as heir, donee, or legatee, of any person deceased. Mager *v.* Grima, 8 How. U. S. 490.

knowledged powers. (*e*) It has been held, (*f*) that if Congress, in the execution of the power to regulate commerce, should pass a

(*e*) Marshall, Ch. J., in Gibbons *v.* Ogden, 9 Wheaton, 203. In the case of The City of New York *v.* Miln, 11 Peters U. S. 102, it was decided, that a law of New York, of February, 1824, requiring, under a penalty, the master of every vessel from any port out of the state to report in writing, within twenty-four hours after his arrival, the names, ages, and last legal settlement of the passengers, and that the master or owners should give bond with sureties to indemnify the city against the future charges of passengers who were not citizens, was not a regulation of commerce, but of police, and was a constitutional and valid law. The case received a very elaborate discussion; but it is rather difficult, as I apprehend, to exempt the New York law from the character of a regulation of commerce, or to withdraw the case out of the reach of the former doctrines of the court, that the power to regulate commerce with foreign nations is, and necessarily must be, *exclusive* in the government of the United States.[6] In pursuance of the principle of this last decision, it was held, in Norris *v.* City of Boston, 4 Metcalf, 282, that a state law prohibiting the landing of alien passengers, until the owner, master, or consignee of the vessel paid two dollars for each passenger, for the support of foreign paupers, was not repugnant to the constitution of the United States. It was a regulation of municipal police, and not of commerce. So, in the case of Worsley *v.* Second Municipality of N. O., 9 Rob. (Louis.) 324, it has been adjudged, that an ordinance of the municipality of New Orleans, imposing a wharfage on all packages landed in or shipped from the limits of the same, was valid, and not repugnant to the constitution of the United States. The constitution of the United States never intended to authorize Congress to interfere with the laws of the states in relation to wharves and other instruments of trade, and in the preservation of harbors, &c. A contribution to defray the expense of constructing bridges or causeways, or removing obstructions in watercourses, and a retribution for this expense, to be paid by those who are benefited, are not an impost, tax, or duty.

Again, in the case of Howell *v.* The State of Maryland, before the Court of Appeals, in December, 1845, 3 Gill, 14, it was decided, that a state tax on the interest in all ships or other vessels, whether in or out of port, owned by persons resident of the state, was a valid tax, and not protected by the act of Congress licensing vessels, nor repugnant to the constitution or laws of the United States.[7]

(*f*) Wilson *v.* The Black-bird Creek Marsh Company, 2 Peters U. S. 245. Thompson, J., 11 Peters U. S. 149, 150, S. P.

[6] In virtue of its police power, a state may make requirements in respect to navigation within the state, additional to those contained in an act of Congress relating to the coasting trade; and the state law is paramount in authority, if it do not conflict with the constitution or any law of the United States. Fitch *v.* Livingston, 4 Sandf. 492. Port laws are constitutional as an exercise of mere police power. Wardens of N. O. *v.* Ship M. J. Ward, 14 La. Ann. 289.

[7] The laws of New York, (2 Rev. St. Part I. ch. 14, title 4, sec. 7, p. 445, and Laws of 1844, ch. 316,) authorized the health commissioner to collect from the master of every vessel arriving in the port of New York, $1.50 for the master himself, $2 for every cabin passenger, &c., and directed the money so collected to be appropriated to the Marine Hospital, and to the Society for the Reformation of Juvenile Delinquents, &c. A law of Massachusetts, of 1837, ch. 238, enacted that no alien passenger shall be allowed to land without the payment of $2, for the support of foreign paupers. The validity of these laws came in question before the Supreme Court in February,

statute controlling state legislation in erecting dams over small navigable creeks where the tide ebbs and flows, it would be valid and binding. But until Congress had actually exercised their power over the subject, the state legislation in that case was not considered as repugnant to the power in Congress in its *dormant* state to regulate commerce.[8] It is admitted, however, (*g*) that the grant to Congress to regulate commerce on the navigable waters of the several states, contains no cession of territory, or of public or private property; and that the states may by law regulate the use of fisheries and oyster-beds within the territorial limits, though upon navigable waters, provided the free use of the waters for purposes of navigation and commercial intercourse be not interrupted. (*h*) [9]

(*g*) Corfield *v.* Coryell, 4 Wash. C. C. 371.

(*h*) In the case of Groves *v.* Slaughter, 15 Peters U. S. 449, there was no opinion of the court on the question of the internal commerce of the states as to the slave-trade; but two of the judges (Ch. J. Taney and Mr. Justice McLean) declared their opinion to be, that the power to regulate traffic in slaves between the different states, resided in the states separately and exclusively; — that each had a right to decide for itself whether it would or would not allow slaves to be brought within its limits from another state, either for sale or otherwise, and to prescribe the manner and mode of their introduction, and the conditions; — that the constitution did not consider slaves as merchandise, and that the action and regulation of the several states on this subject did not trench upon the power of Congress to regulate commerce "among the several states," and could not be controlled by it. It may not be amiss to observe, that in the above case of Groves *v.* Slaughter, it was held, that the clause in the constitution of the state of Mississippi, of 1832, declaring that the introduction

1849, in Smith *v.* Turner, and Norris *v.* City of Boston, and the laws were considered unconstitutional. The court held that they were regulations of commerce, and that such regulations were exclusively reserved to Congress. The chief justice and three judges dissented from the decision, the chief justice considering the laws as part of the pauper system of the state, and not in conflict with any treaty or law of the United States. 7 How. U. S. 283.

In the last cited cases, Mr. Justice Wayne remarked, that the case of New York *v.* Miln., 11 Peters U. S. 102, was erroneously reported as the decision of the court, and that three judges only out of the seven concurred in the opinion of Mr. Justice Thompson. See, also, The People *v.* Brooks, 4 Denio, 469.

[8] States may authorize the construction of bridges over navigable waters within their limits, if their legislation do not conflict with the regulations of Congress. Commonwealth *v.* Prop. of New Bedford Bridge, 2 Gray, 339; Jolly *v.* Terre Haute Bridge Co. 6 McLean, 237; Columbus Ins. Co. *v.* Curtenius, Id. 209; Columbus Ins. Co. *v.* Peoria Bridge Co. Id. 70.

[9] A law, regulating the use of oyster-beds within the territorial limits of a state, may declare and enforce the forfeiture of a vessel which violates its requirements, though the vessel were enrolled and licensed for the coasting trade under the laws of the United States. Smith *v.* State of Maryland, 18 How. U. S. 71.

Progress of the national jurisprudence.

I have now finished the second general division of this course of lectures, relating to the government and constitutional jurisprudence of the United States. Though I have considered the subject in a spirit of free and liberal inquiry, as the series of decisions in the federal courts have been brought under examination, I have uniformly felt, and it has been my invariable disposition to inculcate, a strong sentiment of deference and respect for the judicial authorities of the Union.

No point or question of any moment touching the con-
* 440 struction of the powers of the government, and which * has received an authoritative determination, has been intentionally omitted. There are several important constitutional questions which remain yet to be settled; but if we recur back to the judicial annals of the United States since the year 1800, we shall find that many of the most interesting discussions which had arisen, and which were of a nature to affect deeply the tranquillity of the nation, have auspiciously terminated.

The definition of direct taxes within the intendment of the constitution; the extent of the power of Congress to regulate the power to establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies; the power of Congress over the militia of the states; the power of exclusive legislation over districts and ceded places; the mass of implied powers incidental to the express powers of Congress; such as the power to institute and protect an incorporated bank, to lay a general and indefinite embargo, and to give to the United States, as a creditor, priority of payment, have all received elaborate discussion in the Supreme Court, and they have, to a certain extent, been ascertained and

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of slaves into that state as merchandise or for sale, *should be prohibited* after the 1st of May, 1833, was not operative *per se*, so as to invalidate a contract of sale of a slave introduced in violation of the constitutional provision, and that it was only mandatory upon the state legislature, and required their action to give it effect. The decisions in the state courts of Mississippi were contrary, and they held, that the prohibition in the constitution was a declaration of a principle, and binding as a supreme law, without the addition of legislative sanction, and that a contract of sale of a slave in violation of it was void. This question was discussed in a masterly manner by Ch. J. Sharkey, in the case of Brien *v.* Williamson, 7 How. (Miss.) 14, decided in the High Court of Errors and Appeals of the State of Mississippi, in March, 1843, in favor of the construction and effect already given to the constitution of that state, by the state courts, and in opposition to that given in the case of Groves *v.* Slaughter. The case of Cotton *v.* Brien, 6 Rob. (Louis.) 115, is to the same effect as the decision in Mississippi.

defined by judicial decisions. So, also, the extent of the constitutional prohibitions upon the states not to pass *ex post facto* laws; and not to pass laws impairing the obligation of contracts; and not to impede or control by taxes, or grants, or any other exercise of power, the lawful authorities, or institutions, or rights and privileges depending on the constitution and laws of the United States, has been explored and declared, by a series of determinations, which have contributed, in an eminent degree, to secure and consolidate the Union, and to elevate the dignity and enlarge the influence of the national government.[1]

The power of the President to remove all executive officers in his sound discretion has been settled, not indeed judicially, but perhaps as effectually by the declared sense of the legislature, and the uniform acquiescence and practice of the government.

The absolute and uncontrollable * efficacy of the treaty- *441
making power has also been definitively established, after a struggle against it on the part of the House of Representatives, which, at one time, threatened to disturb the very foundations of the constitution.

The comprehensive claims of the judicial power, as being coextensive with all cases that can arise under the constitution and laws and treaties of the Union, have, in several instances, been powerfully and successfully vindicated. The appellate jurisdiction of the Supreme Courts, over the judgments and decrees of the state courts, under certain circumstances, was defined with great accuracy and precision in the 25th section of the act of 1789, establishing the judicial courts; and the free and independent exercise of that jurisdiction, so essential to the maintenance of the authority and efficiency of the government of the United States, in criminal as well as in civil cases, has been hitherto happily sustained. The means of enforcing obedience, when not voluntarily rendered, to the decision of this appellate jurisdiction, have not been required to be practically applied; and therefore it is a question which the court has not thought it incumbent on

[1] The clause of the constitution providing that "the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states," came under consideration in the New York Common Pleas, in the case of the Fire Department *v.* Noble, 3 E. D. Smith, 440. It was there held, that a statute of the state imposing a tax on insurance companies, not chartered by the state, but doing business within it, as a condition of the right of effecting insurances, was constitutional.

them, as yet, to decide, whether the exercise of that jurisdiction would permit compulsory process to the state courts, with the ordinary methods of enforcing process. The act of Congress (*a*) provided only that on appeal from the judgment or decree of a state court, the writ of error should have the same effect as if the judgment or decree had been rendered or passed in a circuit court, and the proceeding upon a reversal should be the same, except that the Supreme Court, instead of remanding the cause for a final decree, may, at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution. And, with respect to other branches of
* 442 the judicial power, it may * be generally observed, that the extensive sway of admiralty and maritime jurisdiction; the character of the parties necessary to give cognizance to the federal courts; the faith and credit which are to be given in each state to the records and judicial proceedings in every other state; the sovereignty of Congress over all its territories, without the bounds of any particular state; and the entire and supreme authority of all the constitutional powers of the nation, when coming in collision with any of the residuary or asserted powers of the states, have all been declared (as we have seen in the course of these lectures) by an authority which claims our respect and obedience.

In the first ten or twelve years after the institution of the national judiciary, or from 1790 to 1801, the scanty decisions of the Supreme Court are almost all to be found in the third volume of Dallas's Reports. The first great and grave question which came before them was that respecting the liability of a state to be sued by a private creditor; and it is a little remarkable that the court, in one of its earliest decisions, should have assumed a jurisdiction which the authors of The Federalist had a few years before declared to be without any color of foundation. During the period I have mentioned, the federal courts were chiefly occupied with questions concerning their admiralty jurisdiction, and with political and national questions growing out of the Revolutionary War, and the dangerous influence and action of the war of the French revolution upon the neutrality and peace of our country. It was during this portion of our judicial history that the principles of

(*a*) September 24th, 1789, sec. 25.

the doctrines of expatriation, of *ex post facto* laws, of constitutional taxes, and of the construction and obligation of the treaty of 1783, upon the rights of the British creditors, were ably discussed and firmly declared.

The Reports of Mr. Cranch commenced with the year 1801, and the nine volumes of those reports cover the business of a very active period, down to the year 1815. The *Supreme *443 Court was occupied with many great and momentous questions, and especially during that portion of the time in which the United States had abandoned their neutral and assumed a belligerent character. It is curious to observe in these reports the rapid cultivation and complete adoption of the law and learning of the English admiralty and prize courts, notwithstanding those courts had been the constant theme of complaint and obloquy in our political discussions for the fifteen years preceding the war. In the last three volumes of Mr. Cranch, the court was constantly dealing with great questions, embracing the rights and the policy of nations; and the prize and maritime law, not of England only, but of all the commercial nations of Europe, was suddenly introduced, and deeply and permanently interwoven with the municipal law of the United States. We perceive, also, in these volumes, the constant growth and accumulation of cases on commercial law generally, and relating to policies of insurance, negotiable paper, mercantile partnerships, and the various customs of the law merchant. The court was likewise busy in discussing and settling important principles growing out of the limited range of other matters of federal cognizance, and relating to the law of evidence, to frauds, trusts, and mortgages. They were engaged, also, with the doctrine of the limitation of suits, the contract of sale, and with the more enlarged subjects of domicil, of the *lex loci*, of neutrality, and of the numerous points of international law.

By the time of the commencement of Mr. Wheaton's Reports, in 1816, the decisions of the Supreme Court had embraced so many topics of public and municipal law, and those topics had been illustrated by so much talent and learning, that, for the first time in the history of this country, we were enabled to perceive the broad foundations and rapid growth of a code of national jurisprudence. That code has been growing and improving ever since, and it has now become a solid and magnificent structure; and it seems destined, at no very distant period of time, to

*444 cast a shade * over the less elevated, and, perhaps, we must add, the less attractive and ambitious systems of justice in the several states. The most interesting part of Mr. Wheaton's Reports are those which contain the examination of those great constitutional questions which we have been reviewing; and I cannot conceive of anything more grand and imposing in the whole administration of human justice, than the spectacle of the Supreme Court sitting in solemn judgment upon the conflicting claims of the national and state sovereignties, and tranquillizing all jealous and angry passions, and binding together this great confederacy of states in peace and harmony, by the ability, the moderation, and the equity of its decisions.

There are several reasons why we may anticipate the still increasing influence of the federal government, and the continual enlargement of the national system of law in magnitude and value. The judiciary of the United States has an advantage over many of the state courts, in the tenure of the office of the judges, and the liberal and stable provision for their support. The United States are, by these means, fairly entitled to command better talents, and to look for more firmness of purpose, greater independence of action, and brighter displays of learning. The federal administration of justice has a manifest superiority over that of the individual states, in consequence of the uniformity of its decisions, and the universality of their application. Every state court will naturally be disposed to borrow light and aid from the national courts, rather than from the courts of other individual states, which will probably never be so generally respected and understood. The states are multiplying so fast, and the reports of their judicial decisions are becoming so numerous, that few lawyers will be able or willing to master all the intricacies and anomalies of local law, existing beyond the boundaries of their own state. Twenty-six independent state courts of final jurisdiction over the same *445 questions, arising upon the same general * code of common and of equity law, must necessarily impair the symmetry of that code.

The danger to be apprehended is, that students will not have the courage to enter the complicated labyrinth of so many systems, and that they will, of course, entirely neglect them, and be contented with a knowledge of the law of their own state, and the law of the United States, and then resort for further assistance to the never-failing fountains of European wisdom.

But though the national judiciary may be deemed pre-eminent in the weight of its influence, the authority of its decisions, and in the attraction of their materials, there are abundant considerations to cheer and animate us in the cultivation of our own local law. The judicial power of the United States is necessarily limited to national objects. The vast field of the law of property, the very extensive head of equity jurisdiction, and the principal rights and duties which flow from our civil and domestic relations, fall within the control, and we might almost say the exclusive cognizance, of the state governments. We look essentially to the state courts for protection to all these momentous interests. They touch, in their operation, every chord of human sympathy, and control our best destinies. It is their province to reward and to punish. Their blessings and their terrors will accompany us to the fireside, and "be in constant activity before the public eye." The elementary principles of the common law are the same in every state, and equally enlighten and invigorate every part of our country. Our municipal codes can be made to advance with equal steps with that of the nation, in discipline, in wisdom, and in lustre, if the state governments (as they ought in all honest policy) will only render equal patronage and security to the administration of justice. The true interests and the permanent freedom of this country require that the jurisprudence of the individual states should be cultivated, cherished, and exalted, and the dignity and reputation of the state authorities sustained with becoming *pride. In their subordinate relation to the United States, *446 they should endeavor to discharge the duty which they owe to the latter, without forgetting the respect which they owe to themselves. In the appropriate language of Sir William Blackstone, and which he applied to the people of his own country, they should be "loyal, yet free; obedient, and yet independent."

PART III.

OF THE VARIOUS SOURCES OF THE MUNICIPAL LAW OF THE SEVERAL STATES.

LECTURE XX.

OF STATUTE LAW.[1]

MUNICIPAL LAW is a rule of civil conduct, prescribed by the supreme power of a state. Municipal law, or the *jus civile*, is thus explained in the Institutes of Justinian. *Quod quisque populus ipse sibi jus constituit, id ipsius civitatis proprium est, vocaturque jus civile, quasi jus proprium ipsius civitatis.* This definition is less precise and scientific than that given by Sir William Blackstone. Municipal law is composed of written and unwritten, or of statute and common law. Statute law is the express written will of the legislature, rendered authentic by certain prescribed forms and solemnities.

It is a principle in the English law, that an act of Parliament, delivered in clear and intelligible terms, cannot be questioned, or its authority controlled, in any court of justice. "It is," says Sir William Blackstone, "the exercise of the highest authority that the kingdom acknowledges upon earth." When it is said in the books, that a statute contrary to natural equity and reason, or repugnant, or impossible to be performed, is void, the cases are understood to mean, that the courts are to give the statute a reasonable construction. They will not readily presume, out of respect and duty to the lawgiver, that any very unjust or absurd consequence was within the contemplation of the law. But if it

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[1] As to the whole subject embraced in this part of the Commentaries, the student and practitioner will find a mass of valuable information in a work entitled "The Science of Legal Judgment, by James Ram," (Law Lib. vol. 9.)

should happen to be too palpable in its direction to admit of but one construction, there is no doubt in the English law as to the binding * efficacy of the statute. The will of the legis- *448 lature is the supreme law of the land, and demands perfect obedience. (*a*)

But while we admit this conclusion of the English law, we cannot but admire the intrepidity and powerful sense of justice which led Lord Coke, when chief justice of the K. B., to declare, as he did in *Doctor Bonham's case*, (*b*) that the common law doth control acts of Parliament, and adjudges them void, when against common right and reason. The same sense of justice and freedom of opinion led Lord Chief Justice Hobart, in *Day* v. *Savage*, (*c*) to insist that an act of Parliament, made against natural equity, as to make a man judge in his own case, was void; and induced Lord Chief Justice Holt to say, in the case of *The City of London* v. *Wood*, (*d*) that the observation of Lord Coke was not extravagant, but was a very reasonable and true saying. Perhaps what Lord Coke said in his Reports on this point may have been one of the many things that King James alluded to, when he said, that in Coke's Reports there were many dangerous conceits of his own uttered for law, to the prejudice of the crown, parliament, and subjects. (*e*)

Laws repugnant to the constitution void.

The principle in the English government, that the parliament is omnipotent, does not prevail in the United States; though, if there be no constitutional objection to a statute, it is with us as absolute and uncontrollable as laws flowing from the sovereign power, under any other form of government. But in this, and all other countries where there is a written constitution, designating the powers and duties of the legislative, as well as of the other departments of the government, an act of the legislature may be void as being against the constitution. * The law with us must conform, in the first *449 place, to the constitution of the United States, and then to the subordinate constitution of its particular state, and if it infringes the provisions of either, it is so far void.[1] The courts of

(*a*) 1 Blacks. Com. 91, 160, 186; Christian's note to 1 Blacks. Com. 41.
(*b*) 8 Co. 118.
(*c*) Hob. 87.
(*d*) 12 Mod. 687.
(*e*) Bacon's Works, vol. vi. p. 128.

[1] A case in Pennsylvania has been recently decided, involving an important political principle; the court held that a statute, authorizing the citizens of certain counties to

justice have a right, and are in duty bound, to bring every law to the test of the constitution, and to regard the constitution, first of the United States, and then of their own state, as the paramount or supreme law, to which every inferior or derivative power and regulation must conform.[2] The constitution is the act of the people, speaking in their original character, and defining the permanent conditions of the social alliance; and there can be no doubt on the point with us, that every act of the legislative power, contrary to the true intent and meaning of the constitution, is absolutely null and void. The judicial department is the proper power in the government to determine whether a statute be or be not constitutional. The interpretation or construction of the constitution is as much a judicial act, and requires the exercise of the same legal discretion, as the interpretation or construction of a law. To contend that the courts of justice must obey the requisitions of an act of the legislature when it appears to them to have been passed in violation of the constitution, would be to contend that the law was superior to the constitution, and that the judges had no right to look into it, and regard it as a paramount law. It would be rendering the power of the agent greater than that of his principal, and be declaring, that the will of only one concurrent and co-ordinate department of the subordinate authorities under the constitution, was absolute over the other departments, and competent to control, according to its own will and pleasure, the whole fabric of the government, and the fundamental laws on which it rested. The attempt to impose restraints upon the ex-

Power of the judiciary to declare them void.

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decide by ballot whether the sale of spirituous liquors should be continued in said counties, was unconstitutional, as being a delegation of legislative power not permitted by the constitution, and contrary to the theory of the government. Parker *v.* Commonwealth, 6 Barr, 507. So in New York, an act, establishing free schools, which had been submitted by the legislature to the popular vote, was declared to be not a law. Thorne *v.* Cramer, 15 Barb. (N. Y.) 112; Bradley *v.* Baxter, Id. 122; Barto *v.* Himrod, 4 Seld. 483. But a law which confers a new power upon a municipal corporation, e. g. a power to subscribe for shares in a railway company and to borrow money to pay for them is not unconstitutional, on the ground that the electors or tax-payers of the municipality are to decide by a vote whether they will accept and exercise the power. Starin *v.* Town of Genoa, 23 N. Y. 439.

[2] But in order to give the United States courts jurisdiction, the statute of which the validity is questioned must have been passed by a *state — a member of the Union.* If other public bodies encroach upon the Union, redress must be sought in an exercise of some other powers of the government. Scott *v.* Jones, 5 How. U. S. 343.

ercise of the legislative power would be fruitless, if the constitutional provisions were left without any power in the government to guard * and enforce them. From the mass of *450 powers necessarily vested in the legislature, and the active and sovereign nature of those powers; from the numerous bodies of which the legislature is composed, the popular sympathies which it excites, and its immediate dependence upon the people by the means of frequent periodical elections, it follows that the legislative department of the government will have a decided superiority of influence. It is constantly acting upon all the great interests in society, and agitating its hopes and fears. It is liable to be constantly swayed by popular prejudice and passion, and it is difficult to keep it from pressing with injurious weight upon the constitutional rights and privileges of the other departments. An independent judiciary, venerable by its gravity, its dignity, and its wisdom, and deliberating with entire serenity and moderation, is peculiarly fitted for the exalted duty of expounding the constitution, and trying the validity of statutes by that standard. It is only by the free exercise of this power that courts of justice are enabled to repel assaults, and to protect every part of the government, and every member of the community, from undue and destructive innovations upon their chartered rights. (*a*) [1]

(*a*) M. De Tocqueville is of opinion, that if the free institutions of America are to be destroyed, it will be owing to the tyranny of majorities, driving minorities to desperation. The majority constitutes public opinion, which becomes a tyrant, and controls freedom of discussion and independence of mind. This is his view of the question, and English writers on the institutions of society in this country have expressed the same opinion. If there was no check upon the tyranny of legislative majorities, the prospect before us would be gloomy in the extreme. But in addition to the indirect checks of the liberty of the press, and of popular instruction, and of manners, religion,

[1] A resolution by the legislature of Tennessee, that a criminal should be discharged by a court, was held to be an unwarranted assumption of power on the part of the legislature, and void. State *v.* Fleming, 7 Humph. 152. Nor may the legislature grant a new trial, or direct the court to order it. De Chastellux *v.* Fairchild, 15 Penn. 18. The power of a state legislature to overrule a decision of the judiciary is significantly repelled by the Supreme Court of Massachusetts in Denny *v.* Mattoon, 2 Allen, 361, where it was held that the legislature could not confirm a proceeding which had been adjudged void on the ground that the judge before whom the proceeding was had was not entitled to the office.

Courts will not inquire collaterally into the constitutionality of legislative enactments; State *v.* Rich, 20 Mis. 393; Miller *v.* State, 3 Ohio St. 475; and only that part of a statute which is repugnant to the constitution shall be declared void. Fisher *v.* McGirr, 1 Gray, 1.

It has accordingly become a settled principle in the legal polity of this country, that it belongs to the judicial power, as a matter of right and of duty, to declare every act of the legislature, made in violation of the constitution, or of any provision of it, null and void. The progress of this doctrine, and the manner in which it has been discussed and established, is worthy of notice. It had been very ably examined in The Federalist, (*b*) and its solidity vindicated by unanswerable arguments; but it was not until the year 1792 that it seems to have received a judicial consideration.[2]

In *Hayburn's case*, which came before the Circuit Court of the United States for the district of New York, in April, 1791, * 451 the judges proceeded with the utmost delicacy and * caution to declare an act of Congress, assigning ministerial duties to the circuit courts, to be unconstitutional. The court laid down the position, that Congress cannot constitutionally assign to the judicial power any duties which are not strictly judicial; and that the act in question was not obligatory upon the court. But they nevertheless proceeded, voluntarily and *ex gratia*, as commissioners, to execute the duties of the act.

In Pennsylvania and North Carolina, the Circuit Courts of the United States, within those districts, equally held the act not binding upon them, because the legislature had no right or power to assign to them duties not judicial; but they were not so accommodating as the Circuit Court of New York, for they declined to act under the law in any capacity. (*a*)

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and local institutions, there are fundamental rights declared in the constitutions, and there are constitutional checks upon the arbitrary will of majorities confided to the integrity and independence of the judicial department. M. De Tocqueville seems to be deeply impressed with the dangers in a democracy, of the corrupting and controlling power of disciplined faction, and well he may be. The most dangerous and tyrannical of all crafts is party or political craft. The equal rights of a minor party are disregarded in the animated competitions for power; and if it were not for the checks and barriers to which I have alluded, they would fall a sacrifice to the passions of fierce and vindictive majorities. See Tocqueville's De la Democratie en Amerique, tom. ii. c. 15. The whole work is interesting, startling, profound, liberal, and instructive. The author is remarkably fearless, candid, and unprejudiced in his discussions and reflections.

(*b*) No. 78. (*a*) 2 Dallas, 410, 411, 412.

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[2] A writer in the U. S. Law Magazine for June, 1850, p. 563, claims for North Carolina the honor of first establishing, by a judicial decision, the right of the judiciary to decide upon the constitutionality of an act of the legislature. He refers to a case in 1 Martin (N. C.) 48, decided in 1787.

In 1792, the Supreme Court of South Carolina, in the case of *Bowman* v. *Middleton*, (*b*) went further, and set aside an act of the colony legislature, as being against common right and the principles of *magna charta*, for it took away the freehold of one man and vested it in another, without any compensation, or any previous attempt to determine the right. They declared the act to be *ipso facto* void, and that no length of time could give it validity. This was not strictly a question arising upon any special provision of the state constitution; but the court proceeded upon those great fundamental principles which support all government and property, and which have been supposed by many judges in England to be sufficient to check and control the regulations of an act of Parliament. The next case in which the power of the judiciary to disregard or set aside a statute for being repugnant to the constitution, was one that came before Judge Paterson, at Philadelphia, in April, 1795. (*c*) He asserted the duty of the court, and the paramount authority * of the constitution, in re- * 452 markably clear and decided language. That was a case of an act of Pennsylvania, which he held to be unconstitutional, and not binding. He insisted that the constitution was certain and fixed, and contained the permanent will of the people, and was the supreme law, and paramount to the power of the legislature, and could only be revoked or altered by the authority that made it; that the legislature was the creature of the constitution, and owed its existence to the constitution, and derived its powers from the constitution, and all its acts must be conformable to it, or else they will be void.

The same question afterwards arose before the Supreme Court of South Carolina, in the case of *Lindsay* v. *The Charleston Commissioners*, (*a*) and the power of the legislature to take private property for necessary public purposes, as for a public street, was freely discussed; and though the judges were equally divided on the question whether it was a case in which the party was entitled to compensation, those who held him so entitled, held also, that the law was unconstitutional and inoperative until the compensation was made. The judges, in exercising that high authority, claimed to be only the administrators of the public will; and the

(*b*) 1 Bay, 252. (*a*) 2 Bay, 38.
(*c*) Van Horne *v.* Dorrance, 2 Dallas, 304.

law was void, not because the judges had any control over the legislative power, but because the will of the people, declared in the constitution, was paramount to that of their representatives expressed in the law. In *Whittington* v. *Polk*, (*b*) it was decided, in 1802, by the general court of Maryland, with great clearness and force, that an act of the legislature repugnant to the constitution, was void, and that the courts had a right to determine when it was so void.

Hitherto this question, as we have seen, was confined to some of the state courts, and to the subordinate or circuit courts of the United States. But in *Marbury* v. *Madison* (*c*) the subject
*453 was brought under the consideration *of the Supreme Court of the United States, and received a clear and elaborate discussion. The power and duty of the judiciary to disregard an unconstitutional act of Congress, or of any state legislature, were declared, in an argument approaching to the precision and certainty of a mathematical demonstration.

The question, said the chief justice, was, whether an act repugnant to the constitution, can become a law of the land, and it was one deeply interesting to the United States. The powers of the legislature are defined and limited by a written constitution. But to what purpose is that limitation, if those limits may at any time be passed? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited, and acts allowed, are of equal obligation. If the constitution does not control any legislative act repugnant to it, then the legislature may alter the constitution by an ordinary act. The theory of every government, with a written constitution, forming the fundamental and paramount law of the nation, must be, that an act of the legislature repugnant to the constitution is void. If void, it cannot bind the courts, and oblige them to give it effect; for this would be to overthrow in fact what was established in theory, and to make that operative in law which is not law. It is the province and the duty of the judicial department to say what the law is; and if two laws conflict with each other, to decide on the operation of each. So, if the law be in opposition to the constitution, and both apply to a particular case, the court must either decide the

(*b*) 1 Harr. & Johns. 236. (*c*) 1 Cranch, 137.

case conformably to the law, disregarding the constitution, or conformably to the constitution, disregarding the law. If the constitution be superior to an act of the legislature, the courts must decide between these conflicting rules, and how can they close their eyes on the constitution, and see only the law.

This great question may be regarded as now finally settled, and I consider it to be one of the most interesting *points in favor of constitutional liberty, and of the security of property, in this country, that has ever been judicially determined. (*a*) There never was any doubt or difficulty in New York, in respect to the competency of the courts to declare a statute unconstitutional, when it clearly appeared to be so. Thus, in the case of *The People* v. *Platt*, (*b*) the Supreme Court held, that certain statutes affecting the right of Z. Platt, and his assigns, to the exclusive enjoyment of the river Saranac, were in violation of vested rights under his patent, and so far the court held them to be unconstitutional, inoperative, and void. The control which the judicial power of the state had, until the year 1823, over the passing of laws, by the institution of the *council of revision*, anticipated, in a great degree, the necessity of this exercise of duty. A law containing unconstitutional provisions was not likely to escape the notice and objection of the council of revision; and the records of that body will show, that many a bill which had heedlessly passed the two houses of the legislature was objected to and defeated, on constitutional grounds. The *454

(*a*) See decisions in the state courts to the same point, in 1 N. Hamp. 199; 12 Serg. & Rawle, 330, 339; R. M. Charlton, 176; 1 Harr. & Johns. 236; 1 Hayw. 28; 2 Hayw. 310, 374; 1 Murphy, 58; 3 Desaus (S. C.) 476; 1 Rep. Const. C. (S. C.) 267; Le Breton *v.* Morgan, 16 Martin (Louis.) 138; Hoke *v.* Henderson, 4 Dev. (N. C.) 7. When a law requires a constitutional majority of more than a mere numeral majority, the courts of justice may look beyond the law into the proceedings of the legislature, to see that the prerequisites have been complied with, and that it has passed by the constitutional majorities. The State *v.* McBride, 4 Missou. 303. But this last point was left in doubt, in B. and N. F. Railroad *v.* City of Buffalo, 5 Hill (N. Y.) 209.[1]

(*b*) 17 Johns. 195.

[1] In De Bow *v.* The People, 1 Denio, 9, it is held that the judges, in declaring what the law is, may and should, if need be, examine the engrossed bills on file in the office of the Secretary of State, or, it seems, may consult the journals of the houses; and see Purdy *v.* People, 4 Hill, 384; Com. Bank of Buffalo *v.* Sparrow, 2 Denio, 97; Spangler *v.* Jacoby, 14 Ill. 297; People *v.* Supervisors, 4 Seld. 317; Miller *v.* State, 3 Ohio State, 475.

records to which I refer are replete with the assertion of salutary and sound principles of public law and constitutional policy, and they will forever remain a monument of the wisdom, firmness, and integrity of the council. (*c*)[2]

When a statute takes effect.

A statute, when duly made, takes effect from its date, when no time is fixed, and this is now the settled rule.[3] It was so declared by the Supreme Court of the United States in *Matthews* v. *Zane*, (*d*) and it was likewise so adjudged in * the Circuit Court in Massachusetts, in the case of *The Brig Ann.* (*a*) I apprehend that the same rule prevails in the courts of the several states, and that it cannot be admitted that a statute shall, by any fiction or relation, have any effect before it was actually passed. A retroactive statute would partake in its character of the mischiefs of an *ex post facto* law, as to all cases of crimes and penalties; and in every other case relating to contracts or property, it would be against every sound principle. It would come within the reach of the doctrine, that a statute is not to have a retrospective effect; and which doctrine was very much discussed in the case of *Dash* v. *Van Kleeck*, (*b*)

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(*c*) An act of Congress having given to the Secretary of the Treasury the right of appeal from the collector of the customs, on his decision relative to unascertained duties, or duties paid under a protest, it was held, that the aggrieved merchant was confined to that remedy, and could not sustain a suit at law against the collector. Cary *v.* Curtis, 3 How. U. S. 236. The strong objection to the decision is, that it takes the final construction of statute law from the established courts, and places it in an executive officer, holding at the pleasure of the President. It is the common-law right of the citizen to appeal to the courts, on the authority of laws, and to seek there redress from wrong and oppression. The decision of the same court, in Bend *v.* Hoyt, 13 Peters U. S. 263, recognized principles that seem to be at variance with the above decision.

(*d*) 7 Wheaton, 164.

(*a*) 1 Gallison, 62. The same rule is declared in New Jersey by statute. Elmer's Digest, 534.

(*b*) 7 Johns. 477.

[2] It obviously results from the restricted nature of the sovereignty of the federal government that acts of Congress must conform to the constitution, and be confined to the subjects which are enumerated in that instrument. With this limitation, they are of course supreme. On the other hand, the state legislatures have all the powers of sovereignty not granted to the United States, and not withheld by the state constitutions. People *v.* Draper, 15 N. Y. 533; Wynehamer *v.* The People, 13 N. Y. 378.

[3] The time when an act approved and signed by the President takes effect can properly appear only from the act itself. It goes into operation the day on which it is approved, and has relation to the first moment of that day. *In re* Welman, 20 Vermont, 653.

and shown to be founded not only in English law, but on the principles of general jurisprudence. (*c*) A retrospective statute, affecting and changing vested rights, is very generally considered, in this country, as founded on unconstitutional principles, and consequently inoperative and void. (*d*)[3] But this doctrine is not understood to apply to remedial statutes, which may be of a retrospective nature, provided they do not impair contracts, or disturb absolute vested rights, and only go to confirm rights already existing, and in furtherance of the remedy, by curing defects, and adding to the means of * enforcing existing obli- *456
gations. (*a*) Such statutes have been held valid when clearly just and reasonable, and conducive to the general welfare,

(*c*) *Nemo potest mutare consilium suum in alterius injuriam*, Dig. 50, 17, 75; Taylor's Elements of the Civil Law, 168; Code 1, 14, 7; Bracton, 1, 4, fo. 228; Code Napoleon, art. 2.

(*d*) Tennessee Bill of Rights, sec. 20; New Hampshire Bill of Rights, art. 23; Osborne *v.* Huger, 1 Bay, 179; Ogden *v.* Blackledge, 2 Cranch, 272; Bedford *v.* Shilling, 4 Serg. & Rawle, 401; Duncan J., in Eakin *v.* Raub, 12 Ibid. 363 – 372; Society *v.* Wheeler, 2 Gallison, 105; Washington J., in Society for Propagating the Gospel *v.* New Haven, 8 Wheaton, 493; Merrill *v.* Sherburne, 1 N. Hamp. 199; Ward *v.* Barnard, 1 Aiken, 121; Brunswick *v.* Litchfield, 2 Greenl. 28; Proprietors of Ken. Pur. *v.* Laboree, Ibid. 275; Story J., in Wilkinson *v.* Leland, 2 Peters U. S. 657, 658; Lewis *v.* Brackenridge, 1 Black. (Ind.) 220; Jones *v.* Wootten, 1 Harr. (Del.) 77; Forsyth *v.* Marbury, R. M. Charlton, 333; Boyce *v.* Holmes, 2 Ala. N. S. 54; Williamson *v.* Field, 2 Sandf. Ch. 534.[4]

(*a*) Duncan J., in Underwood *v.* Lilly, 10 Serg. & Rawle, 101; Tate *v.* Stoolzfoos, 16 Ibid. 35; Bleakney *v.* F. & M. Bank, 17 Ibid. 64; Hepburn *v.* Curts, 7 Watts, 300; Foster *v.* Essex Bank, 16 Mass. 245; Locke *v.* Dane, 9 Ibid. 360; Oriental Bank *v.* Freese, 18 Maine, 109; Townsend *v.* Townsend, Peck (Tenn.) 16, 17; Ibid. 266; State *v.* Bermudez, 22 Louis. 355. In Patin *v.* Prejean, 7 Louis. 301, it was admitted, that rights acquired under a contract could not be affected or modified by a subsequent statute; but then it was said that the means of enforcing or insuring the enjoyment of such rights might be extended or restricted by the legislature, as circumstances might require. This is a loose and dangerous admission. The language of the Supreme Court of New York, in Butler *v.* Palmer, 1 Hill, 325, is equally so; and it seems to be there conceded, that the legislature has unlimited power to interfere with vested rights, unless they be saved by some restriction to be found in the federal or state constitution!![1] Ch. J. Marshall, in Sturges *v.* Crowninshield, 4 Wheaton, 200, 207, spoke

[3] If statutes are not in terms retrospective, they will not receive that effect by construction, where injustice would be thereby produced. Danks *v.* Quackenbush, 3 Denio, 594; Hooker *v.* Hooker, 10 Smedes & Marsh. 599.

[4] Colony *v.* Dublin, 32 N. Hamp. 432; Torry *v.* Corliss, 33 Maine, 333.

[1] The legislative power of a state is only limited by a constitutional prohibition of *ex post facto* laws, and of laws impairing the obligations of contract. Baltimore & S. R. R. Co. *v.* Nesbit, 10 How. U. S. 395; Wilson *v.* Hardesty, 1 Maryland Ch. 66; McLeod *v.* Burroughs, 9 Georgia, 213.

even though they might operate in a degree upon existing rights, as a statute to confirm former marriages defectively celebrated, or a sale of lands defectively made or acknowledged.[2] The legal rights affected in those cases by the statutes were deemed to have been vested subject to the equity existing against them, and which the statutes recognized and enforced. (*b*) But the cases cannot be extended beyond the circumstances on which they repose, without putting in jeopardy the energy and safety of the general principles. (*c*)

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on this subject in a general and latitudinary manner, which was rather hazardous. He says, that the distinction between the *obligation* of a contract and the *remedy* given to enforce that obligation exists in the nature of things, and that without impairing the obligation of the contract, the remedy may be modified as the wisdom of the nation shall direct. Imprisonment of the debtor is no part of the contract, and he may be released from imprisonment by the legislature, without impairing the obligation. So statutes of limitation relate to the remedies. It, however, seems to me, that to lessen or take away from the extent and efficacy of the remedy to enforce the contract, legally existing when the contract was made, impairs its value and obligation. The Supreme Court of the United States, in Mason *v.* Haile, 12 Wheaton, 378, adopted and established the above *dictum* of Ch. J. Marshall, but not without a frank and just objection on the part of Mr. Justice Washington. He observed, that the great and intelligible principle upon which the cases of Sturges *v.* Crowninshield and Ogden *v.* Saunders were decided was, that a *retrospective* state law, so far as it operated to discharge or vary the terms of an existing contract, impaired its obligation, and that a *prospective* law in its operation had not that effect; and in the last case cited this principle was subverted, and the distinction between retrospective and prospective laws, in their application to contracts, disregarded, and that to abolish imprisonment for debt, and apply it to existing contracts, impaired their obligation. In the subsequent case of Jackson *v.* Lamphire, 3 Peters U. S. 280, it was observed, that state legislatures had the undoubted right to pass recording acts, by which the elder grantee should be postponed to a younger, if the prior deed was not recorded within a limited time. They have the like power to pass limitation laws affecting the time of the remedy on existing contracts.

(*b*) Goshen *v.* Stonington, 4 Conn. 209; Wilkinson *v.* Leland, 2 Peters U. S. 627; Langdon *v.* Strong, 2 Vermont, 234; Watson *v.* Mercer, 8 Peters U. S. 88; 3 Story's Com. on the Constitution, 267.

(*c*) *Retrospective* laws, as used in the constitutions of Tennessee, North Carolina, and Maryland, mean laws impairing the obligation of contracts. Peck (Tenn.) 17. The Supreme Court of the United States, in Satterlee *v.* Matthewson, 2 Peters U. S.

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[2] So an act was held valid, which remedied defects and informalities in the constitution of a banking corporation, by declaring that the bank should be deemed to have been well organized. Syracuse City Bank *v.* Davis, 16 Barb. (N. Y.) 188. In Rich *v.* Flanders, 39 N. Hamp. 304, it was held that a statute with a retroactive effect making parties witnesses was not unconstitutional, although the constitution or bill of rights prohibited the enactment of retrospective laws. See, also, Schenley *v.* Commonwealth, 36 Penn. State, 29.

The English rule formerly was, that if no period was fixed by the statute itself, it took effect by relation, from the first day of the session in which the act was passed, and which might be some weeks, if not months, before the act received the royal sanction, or even before it had been introduced into Parliament. (*d*) This was an extraordinary instance of the doctrine of relation, working gross injustice and absurdity; and yet we find the rule declared and uniformly adhered to, from the time of Henry VI. (*e*) All the judges agreed, in the case of *Partridge* v. *Strange*, in the 6th Edward VI., (*f*) that the statute was to be accounted in law a per-

413, and in Watson *v.* Mercer, 8 Ibid. 110, declared that the Constitution of the United States did not prohibit the states from passing retrospective laws, devesting antecedent vested rights of property, provided such laws did not impair the obligation of contracts, or partake of the character of *ex post facto* laws. The same doctrine was declared by the Chief Justice of the United States, in Charles River Bridge *v.* Warren Bridge, 11 Peters U. S. 539, 540. But though the Constitution of the United States does not reach such state laws, they remain, nevertheless, to be in most cases strongly condemned, as being contrary to right and justice.[3]

It seems to be settled, as the sense of the courts of justice in this country, that the legislature cannot pass any *declaratory* law, or act declaratory of what the law was before its passage, so as to give it any binding weight with the courts. It is only evidence of the sense of the legislature as to the pre-existing law. (See the case of the acts alluded to, *post*, vol. ii. pp. 23, 24.) The powers of government in this country are distributed in departments, and each department is confined within its constitutional limits. The power that makes is not the power to construe the law. That latter trust belongs to the judicial department exclusively.[4] Kent Ch. J., in Jackson *v.* Phelps, 3 Caines, 69; Ogden *v.* Blackledge, 2 Cranch, 272; Jones *v.* Wootten, 1 Harr. (Del.) 77; Field *v.* The People, 2 Scam. (Ill.) 79; Cotton *v.* Brien, 6 Rob. (Louis.) 115. When Lord Bacon composed his admirable aphorisms, De Fontibus Juris, he assumed the proposition that declaratory statutes communicated an interpretation that was as efficacious as if it had been contemporary with the passage of the statute. But in his age, the partition of power among departments was not accurately understood, or precisely defined, or constitutionally limited; and he held, notwithstanding, that they ought not to be passed, except in cases in which a retrospective operation to a statute would be just, — *leges declaratorias ne ordinato, nisi in casibus, ubi legis eum justicia retrospicere possint.* Bacon's Works, vol. vii. 450. Aphorism, 51.

(*d*) 4 Inst. 25.

(*e*) 33 Hen. VI. 18; Bro. Exposition del Terms, 33.

(*f*) 1 Plow. 79.

[3] By art. ii. § 28, of the present constitution of Ohio, "the general assembly shall have no power to pass retroactive laws." The constitution of Tennessee contains a similar provision.

[4] In the recent cases of Reiser *v.* Savings Association, 39 Penn. 137, and Denny *v.* Savings Association, Id. 154. The unconstitutionality of merely declaratory laws is strongly reaffirmed. Such laws may doubtless have the force of a statute prescribing the rule for future cases. But considered retroactively they assume the office of interpretation which belongs exclusively to the judiciary.

fect act from the first day of the session; and all persons
*457 *were to be punished for an offence done against it after the first day of the session, unless a certain time was appointed when the act should take effect. In the case of *The King* v. *Thurston*, (*a*) this doctrine of carrying a statute back by relation to the first day of the session, was admitted in the K. B.; though the consequence of it was to render an act murder which would not have been so without such relation. The case of *The Attorney-General* v. *Panter* (*b*) is another strong instance of the application of this rigorous and unjust rule of the common law, even at so late and enlightened a period of the law as the year 1772. An act for laying a duty on the exportation of rice *thereafter to be exported*, received the royal assent on the 29th of June, 1767, and on the 10th of June of that year the defendants had exported rice. After the act passed, a duty of one hundred and fifteen pounds was demanded upon the prior exportation, and it was adjudged, in the Irish Court of Exchequer, to be payable. The cause was carried by appeal to the British House of Lords, on the ground of the palpable injustice of punishing the party for an act innocent and lawful when it is done; but the decree was affirmed, upon the opinion of the twelve judges, that the statute by legal relation, commenced from the first day of the session. The K. B., also, in *Latless* v. *Holmes*, (*c*) considered the rule to be too well settled to be shaken, and that the court could not take notice of the great hardship of the case. The voice of reason at last prevailed; and by the statute of 33 Geo. III. c. 13, it was declared, that statutes are to have effect only from the time they receive the royal assent; and the former rule was abolished, to use the words of the statute, by reason of "its great and manifest injustice."

There is a good deal of hardship in the rule as it now stands, both here and in England; for a statute is to operate from
*458 the very day it passes, if the law itself does not *establish the time. It is impossible, in any state, and particularly in such a wide-spread dominion as that of the United States, to have notice of the existence of the law, until some time after it has passed. It would be no more than reasonable and just, that the statute should not be deemed to operate upon the persons and property of individuals, or impose pains and penalties for acts done

(*a*) 1 Lev. 91. (*b*) 6 Bro. P. C. 553. (*c*) 4 Term Rep. 660.

in contravention of it, until the law was duly promulgated. The rule, however, is deemed to be fixed beyond the power of judicial control, and no time is allowed for the publication of the law before it operates, when the statute itself gives no time. Thus, in the case of *The Brig Ann*, (*a*) the vessel was libelled and condemned for sailing from Newburyport, in Massachusetts, on the 12th of January, 1808, contrary to the act of Congress of the 9th of January, 1808, though it was admitted the act was not known in Newburyport on the day the brig sailed. The court admitted that the objection to the forfeiture of the brig was founded on the principles of good sense and natural equity; and that unless such time be allowed as would enable the party, with reasonable diligence, to ascertain the existence of the law, an innocent man might be punished in his person and property for an act which was innocent, for aught he knew, or could by possibility have known, when he did it. (*b*)

The code Napoleon (*c*) adopted the true rule on this subject. It declared, that laws were binding from the moment their promulgation could be known, and that the promulgation should be considered as known in the department of the imperial residence one day after that promulgation, and in each of the other departments of the French empire * after the expiration of * 459 the same space of time, augmented by as many days as there were distances of twenty leagues between the seat of government and the place. The New York Revised Statutes (*a*) have also declared the very equitable rule, that every law, unless a different time be prescribed therein, takes effect throughout the state on, and not before, the 20th day after the day of its final passage. (*b*)

If the statute be constitutional in its character, and has duly gone into operation, the next inquiry is, respecting its meaning; and this leads us to a consideration of the established rules of construction, by which its sense and operation are to be understood.

(*a*) 1 Gallison, 62.

(*b*) Judge Livingston, in 1810, held that the embargo law of December, 1807, did not operate upon a vessel which sailed from Georgia on the 15th January, 1808, before notice of the act had arrived. 1 Paine C. C. 23.

(*c*) Art. 1.

(*a*) Vol. i. 157, sec. 12.

(*b*) By the Revised Statutes of Massachusetts, in 1836, it is the thirtieth day

Acts, public and private.

There is a material distinction between public and private statutes, and the books abound with cases explaining this distinction in its application to particular statutes. It is sometimes difficult to draw the line between a public and private act, for statutes frequently relate to matters and things that are partly public and partly private. The most comprehensive, if not the most precise definition in the English books is, that public acts relate to the kingdom at large, and private acts concern the particular interest or benefit of certain individuals, or of particular classes of men. (*c*) Generally speaking, statutes are public; and a private statute may rather be considered an exception to a general rule. It operates upon a particular thing or private persons. It is said not to bind or include strangers in interest to its provisions, and they are not bound to take notice of a private act, even though there be no general saving clause of the rights of third persons. This is a safe and just rule of construction; and it was adopted by the English courts in very early times, and does great credit to their liberality and spirit of justice. (*d*) It is supported by the opinion of Sir Matthew Hale, in *Lucy* v. *Levington*, (*e*) where he lays down the rule to be, that though every man be so far a party to a private act of Parliament as not to gainsay it, yet he is not so far a party
* 460 as to give up his interest. To take the * case stated by Sir Matthew Hale, suppose a statute recites, *that whereas there was a controversy concerning land between A and B, and enacts that A shall enjoy it*, this would not bind the interest of third persons in that land, because they are not strictly parties to the act, but strangers, and it would be manifest injustice that the statute should affect them. This rule, as to the limitation of the operation of private statutes, was adopted by the Supreme Court of New York, and afterwards by the Court of Errors, in *Jackson* v.

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after, and by the constitution of Mississippi, as declared in 1833, it is sixty days thereafter.[1]

(*c*) Dwarris on Statutes, 464; Gilbert on Ev. 39.

(*d*) 37 Hen. VI. 15; Bro. Parliament, pl. 27; Boswell's case, 25 and 26 Eliz. cited in Barrington's case, 8 Co. 138, a.

(*e*) 1 Vent. 175.

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[1] By art. iv. § 20, of the constitution of Michigan, no act shall take effect until ninety days after the end of the session in which it is passed.

Catlin. (*a*)[1] It is likewise a general rule, in the interpretation of statutes limiting rights and interests, not to construe them to embrace the sovereign power or government, unless the same be expressly named therein, or intended by necessary implication. (*b*)[2]

(*a*) 2 Johns. 263. 8 Johns. 520, S. C.

(*b*) 1 Blacks. Com. 261; Comyn's Dig. tit. Parliament, R. 8; The King *v.* Allen, 15 East, 333; The King *v.* Inhabitants of Cumberland, 6 Term Rep. 194; Story J., 2 Mason, 314; Commonwealth *v.* Baldwin, 1 Watts, 54; The People *v.* Rossiter, 4 Cowen, 143; United States *v.* Hewes, U. S. D. C. for Pennsylvania, February, 1840, Crabbe, 307. In cases of grants by the king, in virtue of his prerogative, the old rule was said to be, that nothing passed without clear and determinate words, and the grant was construed most strongly against the grantee, though the rule was otherwise as to private grants. Stanhope's case, Hob. 243; Turner and Atkyns B. Hard. 309; Bro. Abr. Patent, pl. 62; 2 Blacks. Com. 347. But the rule was and is to be taken with much qualification, and applied to doubtful cases, where a choice is fairly open without any violation of the apparent objects of the grant. This was the doctrine in Sir John Molyn's case, (6 Co. 5,) where it was held, that the king's grant should be taken beneficially for the honor of the king and the relief of the subject; and Lord Coke observed in that case, on the gravity or wisdom of the ancient sages of the law, who construed the king's grants beneficially, so as not to make any strict or literal construction in subversion of such grants. He also observed, in his commentary on the statute of quo warranto, (18 Ed. I. 2 Inst. 496, 497,) that the king's patents, not only of liberties, but of lands, tenements, and other things, should have no strict or narrow interpretation for the overthrowing of them; but a liberal and favorable construction for the making of them available in law, *usque ad plenitudinem*, for the honor of the king. And it was always conceded in the cases, that if the grant was declared to be made *ex certa scientia et mero motu*, they were to be construed beneficially for the grantee, according to the intent expressed in the grant, and according to the common understanding and proper signification of the words. Alton Wood's case, 1 Co. 40, b. In the case of Sutton's Hospital, (10 Co. 27,) the doctrine was, that a grant for a charitable purpose is taken most favorably for the object, and that the usual incidents to a corporation are held to be tacitly annexed to the charter.

And if the royal grant was not in a case of mere bounty or donation, but one founded upon a valuable consideration, the stern rule never applies, and the grant is expounded as a private grant, favorable for the grantee, or rather according to its fair meaning, for the grant is a contract. See a clear and full view of the ancient law on the construction of royal grants, by Mr. Justice Story, in his opinion in Charles River Bridge *v.* Warren Bridge, 11 Peters U. S. 589–598. See, also, *infra*, vol. ii. 556.

In addition to the restrictions which the common law has imposed upon the opera

[1] The recitals in public statutes are evidence as to all persons of the facts therein stated. But in regard to private statutes, recitals are evidence as to strangers only of what was represented to the legislature as inducement to pass the act. McKinnon *v.* Bliss, 21 N. Y. 206. A private act may, however, both in its recitals and substance, bind not only the parties to it, but strangers, if the intention is so expressly declared. Shrewsbury *v.* Scott, 6 C. B. (N. S.) 157. And see 8 Clark & Fin. 724.

[2] State *v.* Milburn, 9 Gill, 105. But though not expressly named, the state is not exempted, in virtue of its sovereignty, from the operation of laws passed for the maintenance of religion, the advancement of learning, or the support of the poor. Gladney *v.* Deavors, 11 Geo. 79.

There is another material distinction in respect to public and private statutes. The courts of justice are bound, *ex officio*, to take notice of public acts without their being pleaded, for they are part of the general law of the land, which all persons, and particularly the judges, are presumed to know. Public acts cannot be put in issue by plea. *Nul tiel record* cannot be pleaded to a public statute; the judges are to determine the existence of them from their own knowledge. (*c*) But they are not bound to take notice of private acts, unless they be specially pleaded, and shown in proof, by the party claiming the effect of them. In England the existence even of a private statute cannot be put in issue to be tried by a jury on the plea of *nul tiel record*, though this may be done in New York under the Revised Statutes. (*d*)

Rules for the interpretation of statutes.

The title of the act and the preamble to the act are, strictly speaking, no parts of it. (*e*)[3] They may serve to show the general scope and purport of the act, and the inducements which led to its enactment. They may, at times, aid in the construction of it; (*f*) but generally they are loosely and carelessly inserted, and are not safe expositors of the law. The title frequently alludes to the subject-matter of the act only in general or sweeping terms, or it alludes only to a part of the multifarious matter of which the statute is composed. The constitution of New Jersey, in 1844, has added a new and salutary

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tion of private statutes, they are usually laid under special checks by legislative rules, or by law, as to the notice requisite before a private bill can be introduced. See the notice requisite on the application to the legislature of New York for private purposes. N. Y. R. S. 3d edit. vol. i. p. 161. The constitution of New York (art. 7, sec. 9,) requires the assent of two thirds of the members elected to each house, to every bill appropriating public moneys or property for private purposes.[4] So the legislature of North Carolina is prohibited by their constitution, as amended in 1835, from passing any private law, without thirty days' previous notice of application for the law. The caution, checks, and course of proceedings, in the English parliament, on passing private bills, are detailed at large, and with great precision and accuracy, in May's Treatise upon the Law and Proceedings of Parliament, pp. 383 – 460.

(*c*) The Prince's case, 8 Co. 28, a.

(*d*) Dwarris on Statutes, 520; Trotter *v.* Mills, 6 Wendell, 512.

(*e*) The King *v.* Williams, 1 W. Blacks. 95; Mills *v.* Wilkins, 6 Mod. 62.

(*f*) Sutton's Hospital, 10 Co. 23, 24, b; Boulton *v.* Bull, 2 H. Blacks. 465, 500.

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[3] Ogden *v.* Strong, 2 Paine C. C. 584.

[4] This provision of the constitution of 1821 is not continued in the constitution of 1846. See arts. 3d and 7th of the present constitution of New York for the provisions affecting the passage of acts of the legislature.

check to multitudinous matter, by declaring (*g*) that every law shall embrace but one object, and that shall be expressed in the title. So also in New York, by the revised constitution of 1846, art. 3, sec. 16, no private or local bill shall embrace more than one subject, and that shall be expressed in the title.[5] The title, as it was observed in *United States* v. *Fisher*, (*h*) when taken in connection with other parts, may * assist in re- *461 moving ambiguities where the intent is not plain; for when the mind labors to discover the intention of the legislature, it seizes everything, even the title, from which aid can be derived. So the preamble may be resorted to in order to ascertain the inducements to the making of the statute; but when the words of the enacting clause are clear and positive, recourse must not be had to the preamble. Notwithstanding that Lord Coke (*a*) considers the preamble as a key to open the understanding of the statute, Mr. Barrington, in his Observations on the Statutes, (*b*) has shown by many instances, that a statute frequently recites that which is not the real occasion of the law, or states that doubts existed as to the law, when in fact none had existed. The true rule is, as was declared by Mr. J. Buller and Mr. J. Grose, in *Crespigny* v. *Wittenoom*, (*c*) that the preamble may be resorted to in restraint of the generality of the enacting clause, when it would be inconvenient if not restrained, or it may be resorted to in explanation of the enacting clause, if it be doubtful. This is the whole extent of the influence of the title and preamble in the construction of the statute.[1] The true meaning of the statute is generally and properly to be sought from the body of

(*g*) Art. 4, sec. 7.
(*h*) 2 Cranch, 386.
(*a*) Co. Litt. 79, a.
(*b*) P. 300.
(*c*) 4 Term Rep. 793.

[5] The constitutions of Ohio, Missouri, Iowa, Indiana, Michigan, Georgia, and other states contain a similar provision. It has been decided, in the latter state, that so much only of every statute as contains matter different from what is expressed in the title will be void. Mayor of Savannah *v.* State, 4 Geo. 26. The purpose of the requirement is, that neither the legislature nor the public may be misled by the title; and statutes are to be reasonably construed with a reference to this intent. Sun Mutual Ins. Co. *v.* Mayor, 4 Seld. 241; Guilford *v.* Cornell, 18 Barb. (N. Y.) 615, 640; Conner *v.* Mayor, 1 Seld. 285; Davis *v.* State, 7 Maryl. 151; Belleville R. R. Co. *v.* Gregory, 15 Ill. 20.

[1] The value of the preamble, as an aid in construing a treaty, is considered in Little *v.* Watson, 32 Maine, 214. Its averments are to be regarded as admitted truths.

the act itself. But such is the imperfection of human language, and the want of technical skill in the makers of the law, that statutes often give occasion to the most perplexing and distressing doubts and discussions, arising from the ambiguity that attends them. It requires great experience, as well as the command of a perspicuous diction, to frame a law in such clear and precise terms as to secure it from ambiguous expressions, and from all doubt and criticisms upon its meaning.

It is an established rule in the exposition of statutes, that the intention of the lawgiver is to be deduced from a veiw of
*462 the whole, and of every part of a statute, taken and * compared together. (*a*) The real intention, when accurately ascertained, will always prevail over the literal sense of terms. (*b*) When the expression in a statute is special or particular, but the reason is general, the expression should be deemed general. (*c*) *Scire leges, non hoc est verba earum tenere sed vim ac potestatem*, and the reason and intention of the lawgiver will control the strict letter of the law, when the latter would lead to palpable injustice, contradiction, and absurdity. This was the doctrine of Modestinus, Scævola, Paulus, and Ulpianus, the most illustrious commentators on the Roman law. (*d*) When the words are not explicit, the intention is to be collected from the context, from the occasion and necessity of the law, from the mischief felt, and the objects and the remedy in view; and the intention is to be taken or presumed, according to what is consonant to reason and good discretion. (*e*) These rules, by which the sages of the law, according to Plowden, (*f*) have ever been guided in seeking for the intention of the legislature, are maxims of sound interpretation, which have been accumulated by the experience, and ratified by the approbation of ages.

The words of a statute, if of common use, are to be taken in

(*a*) Co. Litt. 381, a; Marshall C. J., 12 Wheaton, 332; Mason *v.* Finch, 2 Scam. 224.

(*b*) Thompson C. J., in The People *v.* Utica Ins. Co. 15 Johns. 380; Whitney *v.* Whitney, 14 Mass. 92.

(*c*) 10 Co. 101, b.

(*d*) Dig. 1, 3, 17; Ibid. lib. 27, 1, 13, 2. *Maledicta interpretatio quæ corrodit viscera texti.*—Lord Coke.

(*e*) 10 Co. 57, b.; 3 Co. 7; Plowd. 10, 57, 350, 363; Eyre C. J., in Boulton *v.* Bull, 2 H. Blacks. 490; Marshall C. J., 9 Wheaton, 189.

(*f*) Plowd. 205.

their natural, plain, obvious, and ordinary signification and import; (*g*) and if technical words are used, they are to be taken in a technical sense, unless it clearly appears from the context, or other parts of the instrument, that the words were intended to be applied differently from their ordinary or their legal acceptation. (*h*)[1] The current of authority at the present day, said Mr. Justice Bronson, (*i*) is in favor of reading statutes according to the natural and most obvious import of the language, without resorting to subtle and forced constructions, for the purpose of either limiting or extending their operation.[2] A saving clause in a statute is to be rejected, when it is directly repugnant to the purview or body of the act, and could not stand without rendering the act inconsistent and destructive of itself. (*j*) Lord Coke, in *Alton Wood's case*, (*k*) gives a particular illustration of this rule, by a case which would be false doctrine with us, but which serves to show the force of the rule. Thus, if the manor of Dale be by express words given by statute to the king, saving the right of all persons interested therein, or if the statute vests the lands of A in the king, saving the rights of A, the interest of the owner is not * saved, inasmuch as the saving clause is re- *463

(*g*) Story J., 1 Wheaton, 326; Lord Tenterden, 2 B. & Ald. 522.

(*h*) Certainty to a certain extent in general is ordinarily sufficient in the construction of statutes. The words are to be taken in the sense, say the judges in Vermont, that would convey the meaning required, to all men of ordinary discernment alike, and that may be called *certain* without recurring to possible facts which do not appear. Fairlee *v.* Corinth, 9 Vermont, 269.

(*i.*) 20 Wendell, 561. In Mallan *v.* May, 13 Mees. & W. 511, the ordinary rule of construction was declared to be, that words were to be construed according to their strict and primary acceptation, unless from the context of the instrument, and the intention of the parties, to be collected from it, they appear to be used in a different sense, or unless in their strict sense they are incapable of being carried into effect.

(*j*) Plowd. 565; 8 Taunt. 13–18.

(*k*) 1 Co. 47, a.

[1] Whenever in this country a legislature uses a term without defining it, which is well known to the English law, it must be understood in the sense of the English law. McCool *v.* Smith, 1 Black, 459.

[2] "It is a rule, (says Burton J.,) in the construction of statutes, that in the first instance, the grammatical sense of the words is to be adhered to. If that is contrary to or inconsistent with any expressed intention, or any declared purpose of the statute, or if it would involve any absurdity, repugnance, or inconsistency in its different provisions, the grammatical sense must then be modified, extended, or abridged, so far as to avoid such an inconvenience, but no further." Warburton *v.* Loveland, 1 Hud. & Brooke (Irish), 648; Toldervy *v.* Colt, 1 Mees. & W. 264.

pugnant to the grant; and if it were allowed to operate, it would render the grant void and nugatory. But there is a distinction in some of the books between a saving clause and a proviso in the statute, though the reason of the distinction is not very apparent. It was held by all the barons of the Exchequer, in the case of *The Attorney-General* v. *The Governor and Company of Chelsea Waterworks*, (*a*) that where the proviso of an act of Parliament was directly repugnant to the purview of it, the proviso should stand, and be held a repeal of the purview, because it speaks the last intention of the lawgiver.[1] It was compared to a will, in which the latter part, if inconsistent with the former, supersedes and revokes it. But it may be remarked upon this case of *Fitzgibbon*, that a proviso repugnant to the purview of the statute, renders it equally nugatory and void as a repugnant saving clause; and it is difficult to see why the act should be destroyed by the one, and not by the other, or why the proviso and the saving clause, when inconsistent with the body of the act, should not both of them be equally rejected. (*b*) There is also a technical distinction between a proviso and an exception in a statute. If there be an exception in the enacting clause of a statute, it must be negatived in pleading; but if there be a separate proviso, that need not, and the defendant must show it by way of defence. (*c*)[2]

(*a*) Fitz. 195; 4 Geo. II.

(*b*) In Savings Institution *v.* Makin, 23 Maine, 360, it was held, in the case which led to a great and able discussion, that a saving clause in a statute, *in the form of a proviso*, restricting in certain cases the operation of the general language of the enacting clause, was not void, though the proviso be repugnant to the general language of the enacting clause. The true principle undoubtedly is, that the sound interpretation and meaning of the statute, on a view of the enacting clause, saving clause, and proviso, taken and construed together, are to prevail. If the principal object of the act can be accomplished and stand, under the restriction of the saving clause or proviso, the same is not to be held void for repugnancy.

(*c*) Spieres *v.* Parker, 1 Term. Rep. 141; Abbott J., 1 B. & Ald. 99; Thibault *v.* Gibson, 12 Mees. & W. 88; Id. 740. The office of a proviso is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of its extent. Story J., Minis *v.* United States, 15 Peters U. S. 445; Boon *v.* Juliet, 1 Scam. 258.[3]

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[1] Townsend *v.* Brown, 4 Zabr. 80.

[2] People *v.* Toynbee, 2 Park. C. R. 329, 354; Brutton *v.* State, 4 Ind. 602.

[3] In construing statutes, a proviso may be limited to the general scope of the enacting clause to avoid repugnancy. 19 Vermont, 129.

Several acts *in pari materia*, and relating to the same subject, are to be taken together, and compared, in the construction of them, because they are considered as having one object in view, and as acting upon one system. This rule was declared in the cases of *Rex* v. *Loxdale*, and the *Earl of Ailesbury* v. *Pattison*; (*d*) and the rule applies, though some of the statutes may have expired, or are not referred to in the other acts. The object of the rule is to ascertain and carry into effect the intention; and it is to be inferred * that a code of statutes relating to one * 464 subject was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions. Upon the same principle, whenever a power is given by a statute, everything necessary to the making of it effectual, or requisite to attain the end, is implied. *Quando lex aliquid concedit, concedere videtur et id, per quod devenitur ad illud.*

Statutes are likewise to be construed in reference to the principles of the common law; for it is not to be presumed that the legislature intended to make any innovation upon the common law, further than the case absolutely required. This has been the language of the courts in every age; and when we consider the constant, vehement, and exalted eulogy which the ancient sages bestowed upon the common law as the perfection of reason, and the best birthright and noblest inheritance of the subject, we cannot be surprised at the great sanction given to this rule of construction. It was observed by the judges, in the case of *Stowell* v. *Zouche*, (*a*) that it was good for the expositors of a statute to approach as near as they could to the reason of the common law; and the resolution of the barons of the Exchequer, in *Heydon's case*, (*b*) was to this effect. For the sure and true interpretation of all statutes, whether penal or beneficial, four things are to be considered: What was the common law before the act? what was the mischief against which the common law did not provide? what remedy the parliament had provided to cure the defect? and the true reason of the remedy? It was held to be the duty of the judges to make such a construction as should repress the mischief and advance the remedy. (*c*)

(*d*) 1 Burr. 445; Doug. 28. See, also, Vernon's case, 4 Co. 4; 4 Term Rep. 447, 450; 5 Ib. 417; Dwarris on Statutes, 569; Thompson C. J., 15 John. 380, S. P.

(*a*) Plowd. 365. (*b*) 3 Co. 7.

(*c*) This is especially the case as to statutes which relate to matters of public utility,

In the construction of statutes, the sense which the contemporary members of the profession had put upon them is deemed
*465 of some importance, according to the maxim that * *contemporanea expositio est fortissima in lege.* (*a*) Statutes that are remedial, and not penal, are to receive an equitable interpretation, by which the letter of the act is sometimes restrained, and sometimes enlarged, so as more effectually to meet the beneficial end in view, and prevent a failure of the remedy. They are construed liberally, and *ultra* but not *contra* the strict letter. (*b*) This may be illustrated in the case of the registry acts, for giving priority to deeds and mortgages, according to the dates of the registry. If a person claiming under a register deed or mortgage had notice of the unregistered prior deed when he took his deed, and procured the registry of it in order to defeat the prior deed, he shall not prevail with his prior registry, because that would be to counteract the intent and policy of the statutes, which were made to prevent and not to uphold frauds. Statutes are sometimes merely directory, and, in that case, a breach of the direction works no forfeiture or invalidity of the thing done; but it is otherwise if the statute be imperative. (*c*)[1]

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as to establishments of piety, charity, education, and public improvements. Magdalen College case, 11 Co. 71 b.

(*a*) Where the penning of a statute is dubious, long usage is a just medium to expound it by; for *jus et norma loquendi* are governed by usage. The meaning of things spoken or written must be, as it hath been constantly received to be, taken from common acceptation. Ch. J. Vaughan, in Sheppard *v.* Gosnold, Vaugh. 169. A contemporary exposition, even of the constitution of the United States, practised and acquiesced in for a period of years, fixes the construction. Stuart *v.* Laird, 1 Cranch, 299; Martin *v.* Hunter, 1 Wheaton, 304; Cohens *v.* Virginia, 6 Wheaton, 264.[2]

(*b*) Dwarris on Statutes, 615 *et seq.*

(*c*) To interpret a statute strictly, is to adhere precisely to the words or letter of the law, which include, of course, fewer particulars than a freer construction. To interpret it liberally, largely, or comprehensively, is to carry the meaning of the lawgiver into more complete effect than a confined interpretation would allow. It may

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[1] People *v.* Cook, 14 Barb. (N. Y.) 259; for the force of affirmative or negative words in determining the imperative or directory character of statutes, see Savage *v.* Walshe, 26 Ala. 619.

Penal statutes are to be construed strictly. By this is meant only that they are not to be so extended by implication, and beyond the legitimate import of the words used as to embrace cases or acts not clearly described by such words. They are not to be made to involve an absurdity, or frustrate the design of the legislators. Rawson *v.* The State, 19 Conn. 299; United States *v.* Gooding, 12 Wheaton, 460.

[2] See Myrick *v.* Hasey, 27 Maine, 9; Whitcomb *v.* Rood, 20 Vermont, 49.

If an act be penal and temporary by the terms or nature of it, the party offending must be prosecuted and punished before the act expires or is repealed.[3] Though the offence be committed before the expiration of the act, the party cannot be punished after it has expired, unless a particular provision be made by law for the purpose. (*d*) If a statute be repealed, and afterwards the repealing act be repealed, this revives the original act; (*e*)[4] and if a statute be temporary, and limited to a given number of years, and expires by its own limitation, a statute which had been repealed and supplied by it, is *ipso facto* revived. (*f*) If, before the expiration of the time, a temporary statute be continued by another act, it was formerly a question under which statute acts and proceedings were to be considered

Effect of temporary statutes.

be termed the rational interpretation. Rutherforth's Inst. b. 2, c. 7, secs. 3–11. The general rule, even in the construction of a *constitution* is, that where it gives a general power, or enjoins a duty, it gives by implication every particular power necessary for the exercise of the one, or the performance of the other. But if the means for the exercise of the power be also granted, no other or different means or powers can be implied. Field *v.* The People, 2 Scam. 79.

(*d*) Miller's case, 1 Wm. Blacks. 451; Marshall C. J., in Yeaton *v.* United States, 5 Cranch, 281; The Irresistible, 7 Wheaton, 551; The United States *v.* Passmore, 4 Dallas, 372; United States *v.* Preston, 3 Peters U. S. 57; The State *v.* Cole, 2 M'Cord, 1; Anon. 1 Wash. C. C. 84; The State *v.* The Tombeckbee Bank, 1 Stewart (Ala.) 347; Pope *v.* Lewis, 4 Ala. (N. S.) 487; Commonwealth *v.* Marshall, 11 Pick. 350; Allen *v.* Farrow, 2 Bayley (S. C.) 584. The same as to judicial proceedings *begun* under an act, and not finished when it is repealed. They cannot be pursued. 1 Wm. Blacks. 451; 4 Yeates, 392; Wharton's Dig. tit. Statutes A., n. 6; Butler *v.* Palmer, 1 Hill (N. Y.) 324. The proceeding must have been executed, and not executory, to save it from being lost by the repeal. But it seems that a seaman in the navy, put under arrest before his term of service expired, may be retained for trial by a court-martial after his term has expired. This rule of construction is indispensable to the discipline of the navy. Case of Walker on *hab. corp.*, American Jurist, No. 6, p. 281.

(*e*) Case of the Bishops, 12 Co. 7; 2 Inst. 686; Doe *v.* Naylor, 2 Blackf. (Ind.) 32; M'Nair *v.* Ragland, 1 Bad. & Dev. Eq. 525; Commonwealth *v.* Churchill, 2 Metcalf, 118; Wheeler *v.* Roberts, 7 Cowen, 536. A statute in Ohio, of February 14th, 1809, and of Illinois of 19th of January, 1826, abolished the rule of the common law stated in the text, as to the constructive revival of repealed statutes.

(*f*) Collins *v.* Smith, 6 Wharton, 294.

[3] Fenelon's Petition, 7 Barr, 173; Regina *v.* Inhab. of Denton, 14 E. L. & E. R. 124; Saco *v.* Gurney, 34 Maine, 14; State *v.* Youmans, 5 Porter (Ind.) 280; Eaton *v.* Graham, 11 Ill. 619. The repeal of a penal statute does not affect rights in penalties, vested in private individuals under the provisions of the statute. Lakeman *v.* Moore, 32 N. Hamp. 410.

[4] The original statute is revived even where it was repealed by implication only. Hastings *v.* Aiken, 1 Gray, 163.

as done. In the case of *The College of Physicians*, (*g*) it was declared, that if a statute be limited to seven years, and afterwards by another statute be made perpetual, proceedings ought to be referred to the last statute, as being the one in force. But this decision was erroneous, and contrary to what had been said by Popham, Ch. J., in *Dingley* v. *Moor*; (*h*) and all acts, civil and criminal, are to be charged under the authority of the first act. Thus, in the case of *Rex* v. *Morgan*, (*i*) on an indictment for perjury, in an affidavit to hold to bail, it was laid to have been taken by virtue of the statute of 12 Geo. I., which was a temporary law for five years, and which was afterwards, and before the expiration of it, continued by the act of 5 Geo. II., with some alterations. Lord Chief Justice Hardwicke said, that when an act was continued by a subsequent act, everybody was estopped to say the first act was not in force; and as the act in question was not altered in respect to bail, the offence was properly laid to have been done against the first act. In *Shipman* v. *Henbest*, (*j*) the King's Bench held, that if a statute be permitted even to expire, and be afterwards revived by another statute, the law derives its force from the first statute, which is to be considered as in operation by means of revival. If, however, a temporary act be revived after it has expired, the intermediate time is lost, without a special provision reaching to the intermediate time. (*k*)

(*g*) Littleton's Rep. 212.

(*h*) Cro. Eliz. 750.

(*i*) Str. 1066.

(*j*) 4 Term. Rep. 109.

(*k*) Statutes are not considered to be repealed by implication, unless the repugnancy between the new provision and a former statute be plain and unavoidable.[5] Foster's case, 11 Co. 56, 63 a; 1 Rol. 91; 10 Mod. 118, arg.; Bacon's Abr. tit. Statute D. A construction which repeals former statutes or laws by implication, and devests long-approved remedies, is not to be favored in any case. Cowen J., 3 Hill, 472. A statute cannot be repealed by non-user: White *v.* Boot, 2 Term Rep. 274; Dwarris on Statutes, 529; though it is said to have been held in the Scotch law, that statutes lose their force by desuetude after sixty years. See Dr. Irving's Introduction to the Study of the Civil Law, pp. 123–127, on the doctrine in Scotland derived from the civil law, that laws may be abrogated by long disuse.[6]

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[5] Commonwealth *v.* Herrick, 6 Cush. 465. But if the subsequent statute clearly prescribe the only rule to be observed, the former statute, though not repugnant, is repealed. Daviess *v.* Fairbairn, 3 How. U. S. 636. Dexter and Limerick P. R. Co. *v.* Allen, 16 Barb. (N. Y.) 15.

[6] And it was held in O'Hanlon *v.* Myers, 10 Rich. Law (S. C.) 121, that an act may become inoperative from non-user and from disuse of the punishment prescribed, such as "sitting publicly in the stocks."

*If a statute inflicts a penalty for doing an act, the penalty implies a prohibition, and the thing is unlawful, though there be no prohibitory words in the statute. Lord Holt, in *Bartlett* v. *Viner*, (*a*) applied this rule to the case of a statute inflicting a penalty for making a particular contract, such as a simoniacal or usurious contract; and he held that the contract was void under the statute, though there was a penalty imposed for making it. The principle is now settled, that the statutory prohibition is equally efficacious, and the illegality of a breach of the statute the same, whether a thing be prohibited absolutely, or only under a penalty. (*b*)[1] The New York Revised Statutes, (*c*) make the doing an act contrary to a statute prohibition a misdemeanor, though no penalty be imposed. Whether any other punishment can be inflicted than the penalty given by the statute has been made a serious question. (*d*) The Court of K. B., in *Rex* v. *467 Statute penalties.

(*a*) Carth. 251; Skinner, 322.

(*b*) Bensley *v.* Bignold, 5 B. & Ald. 335; De Begnis *v.* Armistead, 10 Bing. 107, S. P.; Dwarris on Statutes, 536; The State *v.* Fletcher, 5 N. Hamp. 257. Every statute made to redress an injury, grievance, or mischief gives an action to the party aggrieved, either expressly or by implication. Van Hook *v.* Whitlock, 2 Edw. Ch. 304. Affirmatives in statutes that introduce a new rule imply a negative of all that is not within the purview. Hob. 298. And when a statute limits a thing to be done in a particular form, it includes in itself a negative, viz. that it shall not be done otherwise. Plowd. 206, b. Affirmative words in a statute do sometimes imply a negative of what is not affirmed, as strongly as if expressed. Nott J., in Cohen *v.* Hoff, 2 Tredway, 661. The word *may*, in a statute, means *must* or *shall*, when the public interest or rights are concerned, or the public or third persons have a claim, *de jure*, that the power shall be exercised. Alderman Blackwell's case, 1 Vern. 152; King *v.* Barlow, 2 Salk. 609; King *v.* Inhabitants of Derby, Skinner, 370; The King *v.* Mayor of Hastings, 1 Dowl. & Ry. 148; Newburgh Turnpike Co. *v.* Miller, 5 Johns. Ch. 113. See, also, 5 Cowen, 193; 1 Peters U. S. 64; 9 Porter, 390.[2] Though penal statutes are said to be construed strictly, yet the courts are bound to give effect to their plain and obvious meaning, and not narrow the construction. They must search out and follow the true intent of the lawgiver. Buller J., in 1 Term Rep. 101; Story J., in 3 Sumner, 209; Pike *v.* Jenkins, 12 N. Hamp. 255.[3]

(*c*) Vol. ii. p. 696, sec. 39.

(*d*) If a statute creates an offence, and does not make it indictable, but prescribes a penalty, a resort to an indictment is precluded. The State *v.* Maze, 6 Humph. (Tenn.) 17.

[1] But when the object of the law is merely to protect the revenue, the imposition of a penalty is not intended to be construed as a prohibition of the contract. Griffith *v.* Wells, 3 Denio, 226.

[2] Mason *v.* Fearson, 9 How. U. S. 248.

[3] In construing penal statutes, courts cannot take into view the motives of the lawgiver further than they are expressed in the statute. State *v.* King, 12 La. An. 593.

Robinson, (*e*) laid down this distinction, that where a statute created a new offence, by making unlawful what was lawful before, and prescribed a particular sanction, it must be pursued, and none other; but where the offence was punishable at common law, and the statute prescribed a particular remedy, without any negative words, express or implied, the sanction was cumulative, and did not take away the common-law punishment, and either remedy might be pursued. (*f*) The same distinction had been declared long before; (*g*) and the proper inquiry in such cases is, was the doing of the thing for which the penalty is inflicted lawful or unlawful, before the passing of the statute?[4] If it was no offence before, the party offending is liable to the penalty, and to nothing else. (*h*) The distinction between statutory offences, which are *mala prohibita* only, or *mala in se*, is now exploded, and a
* 468 breach of the statute law, in either * case, is equally unlawful and equally a breach of duty; and no agreement founded on the contemplation of either class of offences will be enforced at law or in equity. (*a*)[1]

(*e*) 2 Burr. 799; Almy *v.* Harris, 5 Johns. 175; Stafford *v.* Ingersol, 3 Hill, 38, S. P.

(*f*) By common law, acts *contra bonos mores* are indictable; but in Louisiana there is no such mass of undefined indictable offences, and no act is indictable that is not made a statute offence and indictable. The State *v.* Williams, 7 Rob. (Louis.) 252.

(*g*) Castle's case, Cro. J. 644; Regina *v.* Wigg, 2 Salk. 460.

(*h*) A question was raised in the N. Y. District Court of the United States, in the case of The United States *v.* Gates, (4 New York Legal Observer for January, 1846,) how far a penal statute was to be deemed cumulative, or a mere repeal of a prior statute, and only the substitution of another penalty, leaving both penalties or punishments to be inflicted. The question in most cases resolves itself into an inquiry as to the intention of the subsequent law. Cumulative penalties merely do not repeal a former statute; but when new qualifications or modifications are added, the repeal may be inferred; and if the case be not clear, such ought to be the inference, lest a person might be twice punished for the same offence.

(*a*) Aubert *v.* Maze, 2 Bos. & Pull. 371; Cannan *v.* Bryce, 3 B. & Ald. 179; Daniels, *ex parte*, 14 Vesey, 191.

[4] This is the settled rule in the State of New York. Behan *v.* People, 17 N. Y. 516; People *v.* Stevens, 13 Wendell, 341.

[1] Recent cases in the New York Court of Appeals which were carefully considered would seem to qualify to some extent the general proposition of the text. For example, when the legislature prohibited corporations under a penalty from issuing notes of a certain form or description, it was held that the party receiving them for property sold could recover the price against the offending corporation, although the notes were void. Tracy *v.* Tallmage, 14 N. Y. 162; Curtis *v.* Leavitt, 15 Id. 14, 95. So where a banker purchased foreign bank-notes at a rate of discount which the statute prohibited

There are a number of other rules, of minor importance, relative to the construction of statutes, and it will be sufficient to observe, generally, that the great object of the maxims of interpretation is, to discover the true intention of the law; and whenever that intention can be indubitably ascertained, and it be not a violation of constitutional right, the courts are bound to obey it, whatever may be their opinion of its wisdom or policy. (*b*) But it would be quite visionary to expect, in any code of statute law, such precision of thought and perspicuity of language as to preclude all uncertainty as to the meaning, and exempt the community from the evils of vexatious doubts and litigious interpretations. Lord Coke complained, (*c*) that in his day great questions had oftentimes arisen "upon acts of Parliament, overladen with provisos and additions, and many times on a sudden penned or corrected, by men of none, or very little judgment in law." (*d*)

(*b*) Lord Mansfield, in Pray *v.* Edie, 1 Term Rep. 313; Willes, 397; United States *v.* Fisher, 2 Cranch, 399. *Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba expressa fienda est.* The English judges have frequently observed, in answer to the remark that the legislature meant so and so, that they in that case have not so expressed themselves, and therefore the maxim applied, *quod voluit non dixit.* "Where I find the words of a statute perfectly clear, I shall adhere to the words," said Denman C. J., in 4 Nev. & Man. 426.

(*c*) Pref. to 2 Co.

(*d*) In Douglass *v.* Howland, 24 Wendell, 45–47, Mr. Justice Cowen has expressed himself with a justice, strength, and truth on the subject of the interpretation of statutes, worthy to be transcribed. "We cannot," he observes, "escape the power of construction, so long as we have a judicial system. Well-known rules in the construction of statutes ought not to be departed from. Statutes in affirmance of the common law, or in affirmance of judicial construction upon a former statute, ought not to be holden a deviation from the former law, unless it be obviously so. There is scarcely any branch of legal policy more worthy of being enforced, than that which aims to keep the laws of a nation the same in all respects from one age to another, except in points where change becomes absolutely necessary. Time, says Lord Hale, is wiser than all the wits in the world, and the law which has been tried by it has the highest possible evidence in its favor. Time is the schoolmaster which teaches law most effectually, and without which it cannot be generally known. In the New York Revised Statutes of 1830, a vast deal is made up of enactments intended merely to repeat what had been decided by our own or the English courts. But changes in the language of the reports, or rules of court, or the old statutes, occur at every step of the revision. All the general acts were remodelled. An arrangement more scientific, a style improved in elegance and simplicity, were sought to be introduced throughout

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him under a penalty from exacting or receiving, it was held that the seller of the notes could recover the price agreed. Sackett's Harbor Bank *v.* Codd, 18 N. Y. 240. In these cases it was considered that the statutes creating the offences had marked the offender, and that the other party was not in *pari delicto.*

Various and discordant readings, glosses, and commentaries will inevitably arise in the progress of time, and, perhaps, as often from the want of skill and talent in those who comment, as in those who make the law. Though the French codes, digested under the revolutionary authority, are distinguished for sententious brevity, there are numerous volumes of French reports already extant, upon doubtful and difficult questions, arising within a few years after those codes were promulgated. (*e*)

* 469 * The Emperor Justinian, in one of the edicts which he published in confirmation of the authority of the Pandects, and prefixed to that work, expressly prohibited the civilians of his

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the whole; hence short paragraphs, made up of short sentences, generalities, ellipses, complications, equivalent words or translations, for old and well-defined technical terms. In short, the old costume was dismissed, and that of the civil code of France adopted as nearly as could be. Yet I take it that the main substance of what we had before was always intended to be retained. The revision was mainly a re-enactment or codification of the substance, the principle of what we had before, though I admit the identity cannot easily be ascertained in very many instances. It cannot be that the formal changes I have mentioned meant a change in substance. The transmutation of a principle of the common law, or a rule of practice, into a statute, or an old statute, or its received construction into a new one, without a palpable design to depart from the former, ought not to be considered as a departure. We are then left where we were, with all the old helps about us, the old lights burning. It has been a settled rule, in respect to the revision, in 1801, of the old statutes that where the law was antecedently settled by clear expressions or adjudications, the mere change of phraseology was not to be construed a change of the law, unless such phraseology evidently purported an intention to work a change. Case of Yates, 4 Johns. 359; Taylor *v.* Delancey, 2 Caines Cases, 150, 151.[2] If such was the rule of construction under the revision of 1801, which proceeded by cautious and prudent steps, fearful to go even beyond a change of orthography, what shall we say of an age when there is literally a mania for changing every law in some way?"

We are reminded by these remarks of the principles of Solon, the Athenian lawgiver, that it was better to retain old laws, even though in some respects objectionable, than to be always eager to change them for new ones, though possibly superior. Little or no confidence can be placed in the authority of laws which are incessantly altered, remodelled, and exchanged; and those only which have been sanctioned and established by long usage, and under which the citizens had, as it were, been born and educated, are likely to be religiously observed. Schöman's Dissertations on the Assemblies of the Athenians, Cambridge, 1837, p. 240.

(*e*) The Journal du Palais, presentant la Jurisprudence de la Cour de Cassation, et des Cours Royales, sur l'application de tous les Codes Français aux questions douteuses et difficiles, had amounted, in 1818, to fifty volumes and upwards. From the time of the French revolution down to 1828 there were one hundred volumes of statutory law made in France.

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[2] When an English statute, which has received a known construction, is adopted, the construction also is adopted. Adams *v.* Field, 21 Vermont, 256.

time, and those of all future ages, from writing any commentary upon his laws. (*a*) The history of Justinian's reign shows the folly and absurdity of this attempt to bar all future innovation. Greater changes took place in a few years in the laws and jurisprudence of Justinian, said Montesquieu, than in the three hundred years of the French monarchy immediately preceding his time; and those changes were so incessant and so trifling, that the inconstancy of the emperor can only be explained by having recourse to the secret history of Procopius, where he is charged with having sold equally his judgments and his laws. (*b*)

(*a*) Secunda Præfatio Digestorum, sec. 21. In imitation of Justinian, the King of Bavaria, by his royal mandate of October 19th, 1813, prohibited the publishing of any commentaries on his penal code, by officers of state or private scholars. The code of Frederick II. of Prussia referred all dubious constructions of law to the interpretation of a law committee, and the professors of law were not allowed to lecture on the code. Doctor Lieber says that M. de Savigny was the first Prussian jurist who delivered lectures on that code, and he justly observes that interpretation cannot be dispensed with wherever human language is used, except in mathematics. The necessity of it lies in the nature of things, of our mind, and of our language. No code can provide for all specific cases, or be so constructed as to close all further inquiry. In France, Bavaria, Austria, Prussia, &c., some authority is always designated, from which, in doubtful cases, explanations shall be obtained; and in France and Prussia, many large volumes of additions and explanations have been officially published and added to their codes. See Legal and Political Hermeneutics, by Francis Lieber, 2d edit. Boston, 1839, pp. 40 – 46, and which is a treatise replete with accurate logic, and clear and sound principles of interpretation, applicable to the duties of the lawgiver, and the science of jurisprudence.

(*b*) Grandeur des Romains et leur Decadence, c. 20. The best digest that I have seen of the rules and of the examples in the English law concerning the construction of statutes, is to be found in Dwarris's "General Treatise on Statutes," London, 1830, (2d edit. 1848,) and published since the first edition of these commentaries. The rules are illustrated by cases drawn from the whole body of the reports, ancient and modern, in a full and satisfactory manner. See Dwarris, c. 9 and 10, from p. 550 to 694. Mr. (now Sir F.) Dwarris has added to his work an excellent statutory history of English law, from Magna Charta down to the end of the reign of George IV. It is a running commentary on the principal statutes, in which Lord Coke's celebrated exposition of the statutes, in his 2d Institutes, as far as it extends, is essentially incorporated.

LECTURE XXI.

OF REPORTS OF JUDICIAL DECISIONS.

HAVING considered the nature and force of written law, and the general rules which are applied to the interpretation of statutes, we are next to consider the character of unwritten, or common law, and the evidence by which its existence is duly ascertained.

The common law includes those principles, usages, and rules of action applicable to the government and security of person and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature. According to the observation of an eminent English judge, (*a*) a statute law is the will of the legislature in writing, and the common law is nothing but statutes worn out by time; and all the law began by the consent of the legislature.[1]

This is laying down the origin of the common law too strictly. A great proportion of the rules and maxims which constitute the immense code of the common law grew into use by gradual adoption, and received, from time to time, the sanction of the courts of justice, without any legislative act or interference. It was the application of the dictates of natural justice and of cultivated reason to particular cases. In the just language of Sir Matthew Hale, (*b*) the common law of England is, "not the product of the wisdom of some one man, or society of men, in any one age; but of the wisdom, counsel, experience, and observation of many ages of wise and observing men." And his further remarks on this subject would be well worthy the consideration of those bold projectors, who can think of striking off a perfect code of law at a single essay. "Where the subject of any law is single, the prudence of one age may go far at one essay to provide a fit law; and yet, even in the wisest provisions of that kind, experience shows us that new and unthought of emergencies

Sources of the common law.

(*a*) Lord Chief Justice Wilmot, 2 Wils. 348, 351.
(*b*) Preface to Rolle's Abridgment.

[1] See Webster *v.* Reid, 11 How. U. S. 455.

often happen, that necessarily require new supplements, abatements, or explanations. But the body of laws that concern the common justice applicable to a great kingdom is vast and comprehensive, consists of infinite particulars, and must meet with various emergencies, and therefore requires much time, and much experience, as well as much wisdom and prudence, successively to discover defects and inconveniences, and to apply apt supplements and remedies for them; and such are the common laws of England, namely, the productions of much wisdom, time, and experience." (*c*)

But though the great body of the common law consists of a collection of principles, to be found in the opinions of sages, or deduced from universal and immemorial usage, and receiving progressively the sanction of the courts, it is, nevertheless, true, that the common law, so far as it is applicable to our situation and government, has been recognized and adopted, as one entire system, by the constitutions of Massachusetts, New York, New Jersey, and Maryland. It has been assumed by the courts of justice, or declared by statute, with the like modifications, as the law of the land in every * state. It was imported by our colo- *473 nial ancestors, as far as it was applicable, and was sanctioned by royal charters and colonial statutes. (*a*) It is also the

(*c*) Cicero, in like manner, ascribed the excellent Institutes of the Roman republic to the gradual and successive improvements of time and experience; and he held that no one mind was equal to the task. *Nostra respublica non unius esset ingenio sed multorum; nec una hominis vita sed aliquot constituta sæculis et ætatibus — neque cuncta ingenia conlata in unum tantum posse uno tempore providere, ut omnia complecterentur sine rerum usu et vetustate.* De Repub. lib. ii. 1. *Nec temporis unius nec hominis esse constitutionem reipublicæ.* Ib. 2, 21. The Roman system of law, says M. Valette, was not the result of philosophical theories conceived *a priori*, but slowly elaborated by every-day experience, and conformed, under the influence of magistrates and jurisconsults, to all the necessities of society.

(*a*) *Vide supra*, pp. 342, 343, and the opinions of Judge Chase, in the case of The United States *v.* Worrall, 2 Dallas, 394, and of M'Kean C J., in Morris *v.* Vanderen, and Respublica *v.* De Longchamps, 1 Dallas, 67, 111; Statutes of Pennsylvania, 1718, 1777; Laws of Vermont, c. 6, p. 57; Statute of North Carolina, 1778, c. 5; Revised Statutes of North Carolina, 1837, vol. i. p. 110; State *v.* Rollins, 8 N. Hamp. 550; Statute of South Carolina, 1712; Parsons C. J., in Commonwealth *v.* Knowlton, 2 Mass. 534; Story J., in Town of Pawlet *v.* Clark, 9 Cranch, 333; State *v.* Buchanan, 5 Harr. & Johns. 355, 356; McLearn *v.* McLellan, 10 Peters U. S. 631, 635. The constitution of New York, of 1777, declared, that such parts of the common law of England, and of the statute law of England and Great Britain, as, together with the acts of the colonial legislature, formed the law of the colony on the 19th of April, 1775, should continue to be the law of the state, subject, &c. So the common law and

established doctrine, that English statutes, passed before the emigration of our ancestors, and applicable to our situation, and in amendment of the law, constitute a part of the common law of this country. (*b*) [1]

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statute law of England were referred to in Missouri by the statute of 14th January, 1816, as part of the known and existing law of the territory, so far as the same was consistent with the law of the territory, and which, in a modified degree, was the Spanish law. The common and statute law of England, prior to the fourth year of James I., and of a general nature, were adopted by the convention of Virginia, in 1776, and in 1795 and 1805, by the government of Ohio; and such is the substance of the statute law of Arkansas. 2 Ark. R. 206. But the Ohio statute was repealed in 1806. In the Revised Statutes of Illinois, published in 1829, it was declared, that the common law of England, and the English statutes of a general nature made in aid of it, prior to the fourth year of James I., with the exception of those concerning usury, were to be rules of decision until repealed. In 1818, the common law was adopted by statute in the State of Indiana, and in 1835, in Missouri, under the same limitations; and it is understood that the common law and the statute law of England, down to the year 1776, and applicable to their constitution and circumstances, are the law in the states of Mississippi and Georgia. In the latter state the same was declared to be in force by the statute of February 25th, 1784. So the common law of England and the statute law of England, prior to 1760, were adopted by statute in Vermont, so far as they were not repugnant to the constitution or statute law of the state.

(*b*) Patterson *v.* Winn, 5 Peters U. S. 233; Sackett *v.* Sackett, 8 Pick. 309; Opinion of Cranch C. J., in the case Ex parte Watkins, 7 Peters U. S. App. pp. 676, 677; Bogardus *v.* Trinity Church, 4 Paige, 198; The heirs of Girard *v.* The City of Philadelphia, 4 Rawle, 333, Gibson C. J. Statute of North Carolina, 1778, and see the preface to the 1st volume of the Revised Statutes of North Carolina, 1837. About the year 1750, the general assembly of Rhode Island adopted the principal statutes of England relative to property and to the colony, from the statute of Merton down to the 4th and 5th Anne, c. 16. In Georgia, the principal English statutes relative to the essential rights of person and property, from Magna Charta inclusive down to the period of colonial legislation in this country, have been copied and adopted almost literally. It gives the appearance of stability, dignity, and certainty to their statutory jurisprudence. Hotchkiss's Codification of the Statute Law of Georgia, 1845. The Revised Statutes of New Jersey, published in 1847, constitute a plain, practical, and excellent code of statute law, incorporating all the essential parts of the English and colonial statutes prior to our Revolution, applicable to our circumstances, and leaving the settled principles of the common law undisturbed, or more accurately defined. This has been done in several of the other states, with great ability, and under the same enlightened and chastened spirit of moderation. It was the same policy that dictated the statute revisions of New York, in 1801 and 1829. The rage for bold, reckless, and presumptuous innovation, so prevalent at this day, acting in contempt of the usages and wisdom of the common law, does not seem to have reached those statesmen who adopted the statute codes to which I have alluded. A new and improved digest of the statute law

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[1] In New York it was held by the Court of Appeals that the statute of *Quia Emptores*, passed in 1290, became a part of the law of that colony and state, independent of the act concerning tenures, enacted by the legislature in 1787. Van Rensselaer *v.* Hayes, 19 N. Y. 68.

The best evidence of the common law is to be found in the decisions of the courts of justice, contained in numerous volumes of reports, and in the treatises and digests of learned men, which have been multiplying from the earliest periods of the English history down to the present time. (*c*) The reports of judicial decisions contain the most certain evidence, and the most authoritative and precise application of the rules of the common law. Adjudged cases become precedents for future cases resting upon analogous facts, and brought within the same reason; and the diligence of counsel, and the labor of judges, are constantly required, in the study of the reports, in order to understand accurately their import, and the principles they establish.

Force of adjudged cases.

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is quite a practicable and salutary reform, and is to be wholly distinguished from the visionary scheme and attempt to disturb and remodel the long-established institutions and usages of the whole body of the common law, as is now directed to be done by the revised constitution of New York, in 1846. (See *infra*, p. 475.) The Revised Statutes of Massachusetts, in 1836, furnish an instructive model of a revision of the statute law, with such arrangements and improvements as the reasonable spirit of reform dictated. Though I would rather prefer (perhaps from early prepossessions) the old and simple division of statutes into chapters and sections, with the title and date of each law, in historical and chronological order to the complex subdivisions into parts, and titles, and sections, with interminable numbers, on the plan of the continental civilians. The Congress of 1774 claimed to be entitled to the benefit, not only of the common law of England, but of such of the English statutes as existed at the time of their colonization, and which they had by experience respectively found to be applicable to their several local and other circumstances. Journals of Congress, October 14, 1774. This was only declaratory of the principle in the English law, that English subjects going to a new and uninhabited country carry with them, as their birthright, the laws of England existing when the colonization takes place. Blankard *v.* Galdy, 2 Salk. 411; The Decision of the Lords of the Privy Council, 2 P. Wm. 75; Dutton *v.* Howell, Show. Parl. Ca. 31, 32; 1 Blacks. Comm. 108. See, also, Commonwealth *v.* Leach, 1 Mass. 60; Same *v.* Knowlton, 2 Ibid. 534. The rule is different upon the conquest of the country; the conqueror may deal with the inhabitants, and give them what law he pleases, but until an alteration be made, the former laws continue. Calvin's case, 7 Co. 17. The civil code of Louisiana, art. 3521, and the statute of that state of 1828, repealed the Spanish, Roman, and French laws in force when Louisiana was ceded to the United States. But it was held, in Reynolds *v.* Swain, 13 Louisiana Rep. 193, that this repeal only extended to the positive, written, or statute laws of those nations, introductory of a new rule, and not to those which were merely declaratory, and that it was not intended to abrogate those *principles of law* which had been established or settled by the decisions of the courts of justice. It was therefore the daily practice, in the courts of Louisiana, to resort to the laws of Rome and France, and the commentaries on those laws, for the elucidation of principles applicable to analogous cases.

(*c*) In 1840 the legislature of Connecticut declared, that the reports of the judicial decisions of other states and countries should be judicially noticed as evidence of the common law in such state or country.

But to attain a competent knowledge of the common law in all its branches has now become a very serious undertaking, and it requires steady and lasting perseverance, in consequence of the number of books which beset and incumber the path of
*474 the student. (*d*) *The grievance is constantly growing, for the number of periodical law reports and treatises which issue from the English and American press is continually increasing; and if we wish to receive assistance from the commercial system of other nations, and to become acquainted with the principles of the Roman law, as received and adopted in continental Europe, we are in still greater danger of being confounded, and of having our fortitude subdued, by the immensity and variety of the labors of the civilians. (*a*) It is necessary that the student should exercise much discretion and skill in the selection of the books which he is to peruse. To encounter the whole mass of law publications in succession, if practicable, would be a melancholy waste or misapplication of strength and time.

*475 *Lord Bacon, in the aphorisms annexed to his treatise De Augmentis Scientiarum, speaks of the necessity of a revision and digest of the law, in order to restore it to a sound and profitable state, whenever there has arisen a vast accumula-

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(*d*) The number of volumes of English reports, exclusive of reports relating to the courts of admiralty, elections, settlement cases, and Irish reports, amount (1826) to 364; and to render their contents accessible, the digested indexes of the modern reports amount to 33 volumes. The text-books or treatises amount to 184 volumes, and the digests and abridgments to 67 volumes, making, in the whole, a copious library of 648 volumes, in addition to the statute law. See Humphrey on Real Property, p. 163. To these we may add upwards of 200 volumes of American reports, treatises, and digests. In 1839 there were 536 volumes of American reports.

(*a*) M. Camus annexed to his Lettres sur la Profession d'Avocat a catalogue of select books for a lawyer's library, which he deemed the most useful to possess and understand; and that catalogue, in the edition of 1772, included nearly 2,000 volumes, and many of them ponderous folios, and not one of them had anything to do with the English statute or common law. It is now a complaint in France, that the crowd of reports of decisions incumber the law libraries; and M. Dupin, in his Jurisprudence des Arrêts, edit. 1822, alludes to the immensity of such collections, and the great abuses to which that species of jurisprudence is subject. His select law library, for the use of law students and young advocates, contained 343 volumes. One great abuse in the practice of reporting is, that there is no very careful selection of decisions which are only worthy to be reported, but every adjudication, though upon common-place learning, and upon points which have been again and again decided, is usually given in one promiscuous mass. Lord Bacon, in his proposition for the amendment of the law, wisely recommended "that *homonymiæ*, as Justinian called them, that is, cases merely of iteration and repetition, be purged away."

tion of volumes, throwing the system into confusion and uncertainty. He even made a proposition to King James, "touching the compiling and amendment of the laws of England," and offered his services "to compile a digest of the laws." The evils resulting from an indigestible heap of laws, and legal authorities, are great and manifest. They destroy the certainty of the law, and promote litigation, delay, and subtilty. The professors of the law cannot afford the expense and time necessary to collect and study the volumes, and they are obliged to rely too much on the second-hand authority of Digests — *ipse advocatus, cum tot libros perlegere et vincere non possit, compendia sectatur — glossa fortasse aliqua bona.* (*a*) The period anticipated by Lord Bacon seems now to have arrived. The spirit of the present age, and the cause of truth and justice, require more simplicity in the system, and that the text authorities should be reduced within manageable limits; and a new digest of the whole body of the American common law, upon the excellent model of Comyn's Digest, and executed by a like master artist, retaining what is applicable, and rejecting everything that is obsolete and inapplicable to our institutions, would be an immense public blessing. (*b*)

A solemn decision upon a point of law, arising in any given case, becomes an authority in a like case, because it is the high-

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(*a*) Bacon's Aphorisms, *De accumulatione legum nimia*, Aph. No. 53 – 58; *De novis digestus legum*, Aph. No. 59 – 64; *De scriptoribus authenticis*, Aph. No. 78.

(*b*) In the Revised Constitution of New York, of 1846, art. 1, sec. 17, there is a provision made for the digest of the whole body of the laws of the state which makes it the duty of the legislature to appoint three commissioners, to reduce into a written and systematic code the whole body of the law of the state, or so much and such parts thereof as to the commissioners shall seem practical and expedient, and to report thereon to the legislature. The legislature is likewise to appoint three commissioners, who are to revise, reform, simplify, and abridge the rules and practice, pleadings, forms, and proceedings of the courts of record in New York, and report thereon. Art. 6, sec. 24. In England, the statute of 1 and 2 Vict. c. 110, empowered the judges to devise and frame the forms of writs to be used in the practice of the courts. This provision in the English statute shows wisdom in the selection of the agents who are to reform the practice, and a cautious moderation in guiding and limiting their discretion. The Report of the Commissioners appointed to revise the civil code of Pennsylvania, January, 1835, also showed much caution in touching the law of real property; and they appeared solicitous, rather, to expand and mould the old law and the old actions to existing circumstances and the state of society, than to abolish them. Their object clearly appeared to reform and not to innovate, and this is what good sense and sage experience dictate.

est evidence which we can have of the law applicable to the subject, and the judges are bound to follow that decision so long as it stands unreversed, unless it can be shown that the law was misunderstood or misapplied in that particular case. If a decision has been made upon solemn argument and mature
*476 deliberation, the presumption is in *favor of its correctness; and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it. It would therefore be extremely inconvenient to the public, if precedents were not duly regarded and implicitly followed. It is by the notoriety and stability of such rules that professional men can give safe advice to those who consult them; and people in general can venture with confidence to buy and trust, and to deal with each other. If judicial decisions were to be lightly disregarded, we should disturb and unsettle the great landmarks of property. When a rule has been once deliberately adopted and declared, it ought not to be disturbed, unless by a court of appeal or review, and never by the same court, except for very cogent reasons, and upon a clear manifestation of error; and if the practice were otherwise, it would be leaving us in a state of perplexing uncertainty as to the law. (*a*) The language of Sir William Jones (*b*) is exceedingly forcible on this point. "No man," says he, "who is not a lawyer, would ever know how to act; and no man who is a lawyer would, in many instances, know what to advise, unless courts were bound by authority as firmly as the Pagan deities were supposed to be bound by the decrees of fate."

Throughout the whole period of the Year Books, from the reign of Edward III. to that of Henry VII., the judges were incessantly urging the sacredness of precedents, and that a counsellor was not to be heard who spoke against them, and that they ought to judge as the ancient sages taught. If we judge against former precedents, said Ch. J. Prisot, (*c*) it will be a bad example to the barristers and students at law, and they will not give any credit to the books, or have any faith in them. So the Court

(*a*) 16 Johns. 402; 20 Id. 722; Lord Chancellor Parker, 1 P. Wm. 452; Ashurt J., 7 Term Rep. 419; Lord Tenterden, 3 B. & Adol. 17; Best Ch. J., 3 Bing. 588; Cowen J., 23 Wendell, 341.

(*b*) Jones's Essay on Bailment.

(*c*) 33 Hen. VI. 41.

of King's Bench observed in the time of James I., (*d*) that the point which had been often adjudged * ought to rest *477 in peace. The inviolability of precedents was thus inculcated at a period which we have been accustomed to regard as the infancy of our law, with as much zeal and decision as at any subsequent period.

But I wish not to be understood to press too strongly the doctrine of *stare decisis*, when I recollect that there are more than one thousand cases to be pointed out in the English and American books of reports, which have been overruled, doubted, or limited in their application. It is probable that the records of many of the courts in this country are replete with hasty and crude decisions; and such cases ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error. Even a series of decisions are not always conclusive evidence of what is law; and the revision of a decision very often resolves itself into a mere question of expediency, depending upon the consideration of the importance of certainty in the rule, and the extent of property to be affected by a change of it. Lord Mansfield frequently observed, that the certainty of a rule was often of much more importance in mercantile cases than the reason of it, and that a settled rule ought to be observed for the sake of property; and yet, perhaps, no English judge ever made greater innovations and improvements in the law, or felt himself less embarrassed with the disposition of the elder cases when they came in his way, to impede the operation of his enlightened and cultivated judgment. The law of England, he observed, would be an absurd science, were it founded upon precedents only. Precedents were to illustrate principles and to give them a fixed certainty. His successor, Lord Kenyon, acted like a Roman dictator, appointed to recall and reinvigorate the ancient discipline. He controlled or overruled several very important decisions of Lord Mansfield, as dangerous innovations, and on the ground that they had departed from the precedents of former times, and disturbed the landmarks of property, and had unauthorizedly superadded equity powers to a court of law. "It is my wish and my comfort," said that venerable judge, "to

(*d*) Cro. Jac. 527.

stand *super antiquas vias*. I cannot legislate, but by my
*478 * industry I can discover what our predecessors have done,
and I will tread in their footsteps."[1] The English courts seem now to consider it to be their duty to adhere to the authority of adjudged cases, when they have been so clearly, and so often, or so long established, as to create a practical rule of property, notwithstanding they may feel the hardship, or not perceive the reasonableness of the rule. There is great weight in the maxim of Lord Bacon, (*a*) that *optima est lex, quæ minimum relinquit arbitrio judicis; optimus judex, qui minimum sibi.* The great difficulty as to cases consists in making an accurate application of the general principle contained in them to new cases, presenting a change of circumstances. If the analogy be imperfect, the application may be erroneous. The expressions of every judge must also be taken with reference to the case on which he decided; and we must look to the principle of the decision, and not to the manner in which the case is argued upon the bench, otherwise the law will be thrown into extreme confusion. (*b*) The exercise of sound judgment is as necessary in the use, as diligence and learning are requisite in the pursuit, of adjudged cases. (*c*)

Considering the influence of manners upon law, and the force of opinion, which is silently and almost insensibly controlling the course of business and the practice of the courts, it is im-
*479 possible that the fabric of our jurisprudence should * not exhibit deep traces of the progress of society, as well as of the footsteps of time. The ancient reporters are going very fast, not only out of use, but out of date, and almost out of recollec-

(*a*) Bacon's Works, vol. ii. p. 448, Aphor. 46.

(*b*) Best C. J., 2 Bing. 229. Marshall C. J., 6 Wheaton, 399.

(*c*) M. Dupin, in his Jurisprudence des Arrêts, has given us many excellent rules and observations on the value and on the abuse of the authority of reports of judicial decisions. He admits the force of them when correctly stated, and applied with discernment and sobriety; and that they have the force of law when there has been a series of uniform decisions on the same point, because they then become conclusive evidence of the law. The immense collection by M. Merlin, in his Répertoire, and especially in his Questions de Droit, he would say, had the stamp of Papinian, if it were permitted to compare any lawyer to Papinian.

[1] In regard to the sacredness of precedents, a distinction may well exist between those which uphold and those which tend to subvert contracts and titles. More of the latter class, it has been said, can be re-examined without public mischief, and if found to be erroneous, overruled. *Vide* Church *v.* Brown, 21 N. Y. 334, 335.

tion. The modern reports, and the latest of the modern, are the most useful, because they contain the last, and, it is to be presumed, the most correct exposition of the law, and the most judicious application of the abstract and eternal principles of right to the refinements of property. They are likewise accompanied by illustrations best adapted to the inquisitive and cultivated reason of the present age. But the old reporters cannot be entirely neglected, and I shall devote the remainder of this lecture to a short historical review of the principal reporters prior to the present times. No one ought to read a book, said M. Lami, (*a*) (and the remark has peculiar application to law books,) unless he knows something of the author, and when he wrote, and the character of the work, and the character of the edition.

The division line between the ancient and the modern English reports may, for the sake of convenient arrangement, be placed at the revolution in the year 1688. The distinction between the old and new law seems then to be distinctly marked. The cumbersome and oppressive appendages of the feudal tenures were abolished in the reign of Charles II., and the spirit of modern improvement and of commercial policy began then to be more sensibly felt and more actively diffused. The appointment of that great and honest lawyer, Lord Holt, to the station of chief justice of the King's Bench gave a new tone and impulse to the vigor of the common law. The despotism of the Stuarts was abolished forever, and the civil and political liberties of the English nation were more explicitly acknowledged and defined, at the accession of the house of Orange. The old reporters *will *480 include all the reports from the Year Books down to that period; and we will, in the first place, bestow upon those of them which are the most distinguished a cursory glance and rapid review.[1]

Year Books.

The oldest reports extant on the English law are the Year Books, which consist of eleven parts or volumes, written in law French, and extend from the beginning of the

(*a*) Entretiens, sur les Sciénces, et sur la manière d'étudier.

[1] The Record Commission, established about the year 1800, has brought to light a mass of judicial precedents and records contemporaneous with, and, in some instances, anterior to, the Year Books. Generally they are of no great value, except to the antiquary.

reign of Edward II. to the latter end of the reign of Henry VIII., a period of about two hundred years. There are a few broken cases, which may be gleaned from the old abridgments, and particularly from Fitzherbert, which go back to the reign of Henry III. The Year Books were first printed in the reign of James I., and were again printed by subscription in 1679; but they have never been translated, and they are not worth the labor and expense either of a new edition or a translation. The substance of the Year Books was afterwards included in the great abridgments of Statham, Fitzherbert, and Brooke, and those compilations superseded, in a considerable degree, the use of them. The Year Books were very much occupied with discussions touching the forms of writs, and the pleadings and practice in real actions, which have gone entirely out of use. In a late case in the C. B., the judges spoke with some sharpness of reproof against going back to the Year Books in search of a precedent in the case of levying a fine. (*a*) The great authenticity and accuracy of the Year Books arose from the manner in which they were composed. There were four reporters appointed to that duty, and they had a yearly stipend from the crown, and they used to confer together, and the reports being settled by so many persons of approved diligence and learning, deservedly carried great credit with them. (*b*) But so great have been the changes since the feudal ages, in the character of property, the business of civil life, and the
* 481 practice of the courts, that the * mass of curious learning and technical questions contained in the Year Books have sunk into oblivion; and it will be no cause of regret if that learning be destined never to be reclaimed. The Year Books have now become nearly obsolete, and they are valuable only to the antiquary and historian, as a faithful portrait of ancient customs and manners. (*a*)

Dyer. The Year Books ended in the reign of Henry VIII., because persons were no longer appointed to the task of reporting, with the allowance of a fixed salary. Private lawyers then undertook the business of reporting for their own use, or for

(*a*) 2 Taunt. 201.

(*b*) Preface to Plowden's Reports.

(*a*) In 1 Barn. & Cress. 410, the Court of King's Bench decided a case chiefly upon the authority of a citation from the Year Book of 42 Edw. III., but such a reference is rare.

the purpose of publication. Many English lawyers have regretted that the practice of appointing public reporters, with a stipulated compensation, as is now the American practice, was not continued, as it would have relieved the profession from many hasty and inaccurate reports, which have greatly increased the uncertainty of the law. The Reports of Dyer relate to the reigns of Henry VIII., Edward VI., Mary, and Elizabeth. They have always been held in high estimation, for Dyer presided as chief justice in the C. B. for upwards of twenty years, and was distinguished for learning, ability, and firmness. His reports were afterwards enriched by marginal notes of Chief Justice Treby, and which are said, by Mr. Justice Buller, (*b*) to be good law. The work was compiled in law French, and published in an English translation, in 1793, with the notes.

Plowden's Commentaries embraced the same period as the reports of Dyer. They bear as high a reputation for accuracy as any ancient book of reports, though Lord Coke said he had discovered four cases in Plowden which were erroneous. (*c*) Plowden gives the pleadings in those cases in * which judgment was entered; and the arguments of coun- *482 sel, and the decisions on the bench, very much at large. They were first published in 1578, and taken originally, as he says, for his private use. But he took great pains in rendering his work accurate, and he reported nothing but what had been debated and decided upon demurrer or special verdict; and his reports were likewise submitted to the inspection of the sergeants and judges. The work is, therefore, distinguished for its authenticity and accuracy; and though not of so dramatic a character as much of the Year Books, it is exceedingly interesting and instructive, by the evidence it affords of the extensive learning, sound doctrine, and logical skill of the ancient English bar.

Plowden.

Lord Coke's Reports, in thirteen parts or volumes, are confined to the reigns of Elizabeth and James, and deservedly stand at the head of the ancient reports, as an immense repository of common-law learning. The first eleven books of his reports contain about five hundred cases, and were published in his lifetime, and he took care to report and publish only what he calls leading cases, and conducive to the public quiet. Lord

Coke's Reports.

(*b*) 2 Term Rep. 84.

(*c*) Bacon's Works, vol. vi. p. 122.

Bacon said, that had it not been for Sir Edward Coke's Reports, the law in that age would have been almost like a ship without ballast; and that though "they had extrajudicial resolutions, they did contain infinite good decisions." Much of the various and desultory learning in these reports is law to this day; and the most valuable of the cases reported have been selected, and recommended to the attention of the American student, by Professor Hoffman, of the University of Maryland, in his "Course of Legal Study." When these reports were published, between 1600 and 1615, there were no other prior reports but the Year Books, Dyer, and Plowden. Lord Coke said, that he endeavored, in his reports, to avoid obscurity, ambiguity, and prolixity. It is singular that he should have so egregiously failed in his purpose. The want of methodical arrangement and lucid order is so
*483 manifest in his reports, *and he abounds so greatly in extrajudicial *dicta* and collateral discussions, that he is distinguished above most other reporters for the very defects he intended to avoid. It is often very difficult to separate the arguments of counsel from the reasons and decisions of the court, and to ascertain precisely the point adjudged. This, probably, gave occasion to Ireland and Manley's Abridgment of Lord Coke's Reports, in which they undertake to detach from the work all the collateral discussion and learning, and to give only the "very substance and marrow" of the reports. A work of this kind may be convenient in the hurry of research, but I believe no accurate lawyer would ever be contented to repose himself upon such a barren account of a decision, without looking into the reason and authorities on which it was founded. (*a*) With all their defects, Lord Coke's Reports are a standard work of that age, and they alone are sufficient to have discharged him from that great obligation of duty with which he said he was bound to his profession. When Coke's Reports were first published, they gave much offence to King James, as containing many doctrines which were deemed too free and injurious to the prerogative of the crown; and the king commanded Lord Coke to strike out the offensive parts, and he also referred the work to

(*a*) We have Lord Coke's authority on the very point. "The advised and orderly reading over of the books at large, I absolutely determine to be the right way to enduring and perfect knowledge; and to use abridgments as tables, and to trust only to the books at large." Dedication of Coke's Reports to the Reader, p. 11.

his judges to be corrected. (*b*) But Lord Coke was too independent in spirit, and he had too high a regard to truth and law, to gratify the king on this subject; and he was, for this and other causes, removed from the office of chief justice of the K. B.

Hobart's Reports of cases in the time of James I. were printed in 1646, and, in a subsequent age, they were revised * and corrected by Lord Chancellor Nottingham. * 484 Like the reports of Lord Coke, they are defective in method and precision, and are replete with copious legal discussions. Hobart was chief justice of the C. B., and a great lawyer. Judge Jenkins, the contemporary of Coke and Hobart, has given us, in the preface to his Reports, an exalted eulogy on those distinguished men, and the biographical sketch of their characters is peculiarly animated and lively. Jenkins compiled his reports or centuries, (as he quaintly terms them,) during the tumult of the civil wars under Charles I. and the commonwealth, and they resemble more a digest of decisions after the manner of Fitzherbert and Brooke than regular reports of adjudged cases. From his intemperate language and hard fate, it is evident he was a zealous royalist, and had provoked the resentment of his enemies. He composed his work, as he says, when he was "broken with old age and confinement in prison, where his fellow-subjects, grown wild with rage, had detained him for fifteen years, and that he was surrounded with an odious multitude of barbarians." He renders a just tribute of veneration to the memory of Lord Coke and Lord Hobart, as two men who had furnished surpassing light to the professors of the law. They were judges of great authority and dignity, who to the most accurate eloquence joined a superlative knowledge of the laws, and consummate integrity, and whose names, he said, would flourish as long as the laws and the kingdom should endure. Lord Hobart, as he continues to observe, was adorned with the brightest endowments, and a piercing understanding, and he had always equity before his eyes. Lord Coke was a judge whom power could not break nor favor bend. He received the smiles and frowns of the court by turns, and possessed an immense fortune, which he had honestly acquired. The only thing objected to him as a fault was, that he was thought to go too great lengths with the republican party; but he admits that he died in the highest estimation.

Hobart.

(*b*) Lord Bacon's Works, vol. vi. pp. 121, 128, 132, 173.

*485 * Croke's Reports of decisions in the courts of law in the reigns of Elizabeth, James, and Charles are a work of credit and celebrity among the old reporters. They commenced about the time that Dyer ended, and were first published under the protectorate of Cromwell. From the character of the judge, his gravity, learning, diligence, and advantages, and from the precision and brevity of his cases, these reports have sustained their character in every succeeding age, and are, to this day, familiarly referred to as an authentic depository of the rules of the common law.

Croke.

The Reports of Yelverton are a small collection of select cases, in the latter part of the reign of Elizabeth, and the first ten years of the reign of James. He was a judge of the C. B., and one of the most eminent lawyers of that age, which was truly the Augustan age of the old common-law learning. These reports have been lately recommended to the notice of the American lawyer by a new edition, published in this country, and enriched with copious, valuable, and accurate notes by Mr. Metcalf.[1]

Yelverton.

In the reign of Charles II., the most distinguished of the Reports are those of Chief Justice Saunders. They are confined to decisions in the K. B. for the space of six years, between the 18th and 24th years of the reign of Charles II., and contain the pleadings and entries in cases decided, as well as the arguments of counsel, and the judgments of the court. They are recommended for the accuracy of the entries, and the concise, clear, and pointed method of decision; and are particularly valuable to the practising lawyer, as a book of precedents as well as of decisions. They have always been esteemed the most accurate and valuable reports of that age, and this is the character which has been repeatedly given of them by the judges in modern times. (*a*) A new edition of these reports was published in 1799, by Sergeant Williams, with very copious *486 notes, which, in many * instances, are distinct and elaborate essays on the subjects of which they treat. Lord Eldon has said, in reference to this edition, that to any one in a

Saunders.

(*a*) Burr. 1730; 2 Bos. & Pull. 23.

[1] The three volumes of Croke are cited by the names of the reigns to which they relate: as Cro. Car., Cro. Eliz., and Cro. Jac.

judicial situation, it would be sufficiently flattering to have it said of him, that he was as good a common lawyer as Sergeant Williams, and that no man ever lived to whom the character of a great common lawyer more properly applied. I have no doubt of the merit of the edition, and of the great learning of the editor. The authorities, new and old, applicable to the subject, are industriously collected and methodically arranged. But with all the praise justly due to the edition, it is liable to the great objection of making one of the old reporters the vehicle of voluminous dissertations. They introduce perplexity and confusion by their number and length. If such treatises were published by themselves, the student would know better where to find them; but when appended to a plain reporter, they seem to be out of place. Notes would appear to be more appropriate, if they were confined simply and dryly to the illustration of the case in the text, and to show, by a reference to other decisions, how far it might still be regarded as an authority, and when and where it had been confirmed, or questioned, or extended, or restricted, or overruled. The convenience and economy of the profession would certainly be well consulted by this course. This edition of Saunders so far surpasses in extent and variety of learning the original work, as to become a new work of itself, which might properly be denominated Williams's Notes; and the venerable simplicity of the reporter is obscured and lost, in the commentaries of the annotator. (*a*) [1]

Vaughan.

The Reports of Chief Justice Vaughan contain some very interesting cases. He was a grave and excellent judge, and his reports consist chiefly of his own arguments and opinions, delivered while he was chief justice, and they are distinguished for great variety of learning. The Reports of Sir Thomas Jones,

(*a*) The distinguished Reports of Saunders, edited by Sergeant Williams, appeared in a 5th edition, by Mr. Justice Paterson, of the Q. B., and afterwards, in 1847, in a 6th edition, by Edward Vaughan Williams, in 3 vols. octavo.

[1] The "Modern Reports" are so frequently cited as to deserve a notice. Citations are usually made from a publication which appeared about 1793, in twelve volumes. Originally the work consisted of four volumes, the last of which appeared in 1703. Between this time and 1738 the remaining volumes were published at different periods. The second and third are the volumes of most authority, the others having been condemned by different judges. The authorship of vol. i. is attributed to Joseph Washington, a collateral ancestor of George Washington. Sparks's Life of Wash., App. 500, 501.

who was also chief justice in the reign of Charles II.; of
* 487 Sir Creswell Levinz, who was a judge of the * C. B.; of Sir Gefrey Palmer, who was attorney-general under Charles II.; of Lord Chief Justice Pollexfen, whose reports consist of cases argued by him while he was at the bar; and of Sir William Jones, who was for twenty-two years a judge, are all of them works of authority, though a considerable part of the discussions and decisions which they record ceases at this day to excite much attention, or to be very applicable to the new and varied course of human affairs. And, indeed, it may be here observed, that a very large proportion of the matter contained in the old reporters, prior to the English revolution, has become superseded, and is now cast into the shade by the improvement of modern times; by the disuse of real actions, and of the subtleties of special pleadings; by the cultivation of maritime jurisprudence; by the growing value and variety of personal contracts; by the spirit of commerce, and the enlargement of equity jurisdiction; by the introduction of more liberal and enlightened views of justice and public policy; and, in short, by the study and influence of the civil law.

Value of the old reports.

In perusing the old reports, we cannot but be struck with the long, laborious, and subtle arguments, and the great delay which accompanied the investigation of points of law. Thus, for instance, the case of *Stowell* v. *Zouche*, in Plowden, was argued twice in the C. B.; and then twice in the Exchequer chamber, before all the judges in England. *Calvin's case*, in Coke, was argued first at the bar of the K. B. by counsel, then in the Exchequer chamber, first by counsel, and then by all the judges. It was afterwards argued by counsel at two different times, and then by all the judges at the next term, upon four different days; and at another term thereafter by all the judges on four different days. So again in *Manby and Richards* v. *Scott*, in Levinz, the case was argued at the bar three several times, by distinct counsel each time, and afterwards by all the judges at the bench. It was quite common in former times to have a case spoken to at two, and three, and four several times, and each time at a different
* 488 term, before judgment was rendered. In * Lord Chief Justice Willes's Reports, in the reign of George II., we find a case which was argued five times, and at five distinct terms, and the judgment was not rendered until the space of five years had

elapsed from the first argument. It was not until the time of Lord Mansfield, that such repeated arguments were disused, and great despatch and unexampled facility and vigor given to the administration of justice. There were some advantages attending repeated discussions, which served as a compensation for the delay and expense attending them. They tended to dissipate shadows and doubts, and to unite the opinions on the bench, and prevent that constant division among the judges which has much weakened the authority of some of our American courts.

From the era of the English revolution, the reports increase in value and importance; and they deal more in points of law applicable to the great change in property, and the commerce and business of the present times. I shall not undertake to speak critically of the particular merits of the modern reports, for this would lead me into too extensive details. Those of Lord Raymond and Sergeant Salkeld embrace the reigns of William and Mary, and Queen Anne; and during that period Lord Chief Justice Holt gave lustre to the jurisprudence of his country. The Reports of Sir John Strange, of Lord Chief Baron Comyns, of Lord Chief Justice Willes, and a part of the Reports of Sergeant Wilson, occupy the reigns of George I. and II.; and they are all respectable, and the Reports of Willes and Wilson, in particular, very accurate repositories of the judicial decisions of those reigns. The Reports of Lord Raymond and of Sergeant Wilson are also peculiarly valuable to the pleader, for the many useful entries and forms of pleadings which accompany the cases. From that period the English Reports are to be read and studied with profound attention. The Reports of Burrow, Cowper, and Douglass contain the substance of Lord Mansfield's judicial decisions, and they are among the most interesting reports in the English * law. All the courts of law at Westminster have * 489 been filled with very eminent men, since the time of the accession of George III.; and we need only refer to the Term Reports, and to East and his successors, as reporters to the King's Bench, and to Wilson, Henry Blackstone, Bosanquet & Puller, Taunton, and their successors in C. B., for views and sketches of the English law in its most correct and cultivated state. Modern reports.

A still deeper interest must be felt by the American lawyer in the perusal of the judicial decisions of his own country. Our American reports contain an exposition of the common law, as

received and modified in reference to the genius of our institutions. By that law we are governed and protected, and it cannot but awaken a correspondent attachment. But I need not undertake the invidious task of selection and discrimination among the numerous volumes of the reports of American decisions. Their relative character must be familiar to the profession, and it will be sufficient to advise the student to examine thoroughly, and obtain the mastery of the principles of law as expounded and declared by our more important tribunals, whether they be of federal or of state jurisdiction.

We have hitherto confined our attention to the reports of cases in the courts of common law. But the system of equity is equally to be found embodied in the reports of the adjudged cases; and the rules and usages of the Court of Chancery are as fixed as those which govern other tribunals. They have been regarded as a kind of secondary common law, framed or promulgated by the Court of Chancery within the two last centuries. That court is as much bound as a court of law, by a series of decisions, applicable to the case, and establishing a rule. It has no discretionary power over principles and established precedents; and chancery has grown to be a jurisdiction of so much strict technical rule, that it is said by a distinguished writer on equity doctrines, that there are now many settled rules of equity which require to be moderated by the rules of good conscience, as much as the most rigorous rules of law did, before the chancellors interfered on equitable * grounds. (*a*) A court of equity becomes, in the lapse of time, by gradual and almost imperceptible degrees, a court of strict technical jurisprudence, like a court of law. The binding nature of precedents in a court of equity was felt and acknowledged by Lord Keeper Bridgman, in the reign of Charles II.; (*b*) and in the case of *The Earl of Mountague* v. *Lord Bath*, (*c*) soon after the revolution, Lord Chief Justice Treby, who sat for the lord chancellor, declared that the Court of Chancery was limited by the precedents and practice of former times, and that it was dangerous to extend its authority further. At this day, justice is administered in a court of equity upon as fixed and certain principles as in a court of law; and Lord Eldon

Chancery decisions.

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(*a*) Sugden's Letters to a Man of Property, p. 4.
(*b*) 1 Mod. 307.
(*c*) 3 Ch. Cas. 95.

has secured to himself a title to the reverence of his countrymen, by resisting the temptation, so often pressed upon him, to make principles and precedents bend to the hardship of a particular case. (*d*) In this country it is at least as important as in any other, that the administration of justice, both legal and equitable, should be stable and uniform; and especially if there be any weight in the opinion of an ancient English lawyer, that "variety of judgments and novelty of opinions were the two plagues of a commonwealth." (*e*)

We have no reports of chancery decisions until subsequent to the time of Lord Bacon.[1] Anciently, the Court of Chancery administered justice according to what appeared to be the dictate of conscience as applied to the case, without any regard to law or rule; and great inconvenience and mischief must have been produced in the infancy of the court, by reason of the uncertainty and inconsistency of its decisions, flowing from the want of settled principles. The jurisdiction of the court was greatly enlarged in the time of Cardinal Wolsey, who was chancellor under Henry VIII.; *and he maintained his equitable jurisdic- *491
tion with a high hand, and exercised his authority over everything which could be a subject of judicial inquiry, and decided with very little regard to the common law. This conduct in his judicial capacity was one of the grounds of accusation against him when he was impeached. Under his successor, Sir Thomas More, who is said to have been the first chancellor that ever had the requisite legal education, (*a*) business rose again with rapidity,

(*d*) Lord Chancellor Hart has observed, however, (and he had been familiar with the English Chancery practice,) that Lord Eldon was not the slave of authority, for his doctrine was, that everything in equity turns on the circumstances, and what the court had to see was, whether the circumstances took the case out of the usual rule. In equity there is no rule so inflexible as not to bend to the special circumstances of a particular case. Moore *v.* McKay, 2 Molloy, 134. See, also, Montesquieu *v.* Sandys, 18 Vesey, 302.

(*e*) Pref. to Jenkins's Centuries.

(*a*) But Lord Campbell, in his Lives of the Lord Chancellors, mentions some distinguished chancellors taken from the common-law courts in much earlier times.

[1] The "Calendars of Proceeding in Chancery," published by the British government in 1827, carry the history of equity jurisprudence back to a very early period. The precedents brought to light are generally of little present value. In one case in this country, of great importance, these Calendars were copiously referred to as tending to elucidate the history and law of charitable uses. Vidal *v.* The City of Philadelphia, 2 How. 196.

and to such an extent as to require the assistance of a master of the rolls. He allowed injunctions so freely as to displease the common-law judges, though he acted always with great ability and integrity. (*b*) To show how wonderfully business in chancery had increased by the time of Lord Bacon, we need only recur to the fact which he gives us himself, (*c*) that he made two thousand orders and decrees in a year; and yet we have not a single decision of his reported.

Those decisions, if well and faithfully reported, would doubtless have presented to the world a clear illustration and masterly display of many principles of equity since greatly considered and discussed; for even upon dry technical rules and points of law he shed the illuminations of his mighty mind.

In West's Symboleography, a work published at the close of Elizabeth's reign, we have divers curious and authentic precedents of the process, and bills, and answers in chancery, prior to the time of Bacon. We have, also, in the same work, a brief digest of the powers and jurisdiction of the court, from which it would appear, that equity was regarded in that day as a matter of arbitrary conscience, unincumbered by any rules or principles of law. No cases are cited to show what the authority was, but such as were gleaned from the Year Books, and the trea-
* 492 tises of the Doctor * and Student, and of the Diversity of Courts. (*a*) It was not until after the restoration that any reports of adjudged cases in chancery were published. The volumes entitled "Reports of Cases taken and adjudged in the Court of Chancery, in the reigns of Charles I., Charles II., James II., William III., and Queen Anne," commence with the reign of Charles I., and contain the earliest adjudged cases in equity. But that work, and another contemporary work of the same character, entitled "Cases argued and adjudged in the High Court of Chancery," are both of them, in their general character, loose, meagre, and inaccurate reports, of not much weight or authority. The reports of some cases decided by Lord Chancellor

Earliest chancery reports.

(*b*) Reeves's History of the English Law, vol. iv. pp. 368–377.

(*c*) Bacon's Works, vol. iv. p. 530.

(*a*) The Diversity of Courts and their Jurisdictions is a very brief treatise, compiled in law French, under Henry VIII., and translated into English by Wm. Hughes, under Charles I. It stated, that in chancery "a man shall have remedy for that for which he can have no remedy at the common law; and it is called by the common people, the *court of conscience.*" It is printed at the end of the Mirror of Justices.

Cowper, in the third and last volume of the Reports in Chancery, and the great case of *The Duke of Norfolk*, and the case of *Bath and Mountague*, at the conclusion of the Cases in Chancery, are distinguished exceptions to this complaint, and those great cases are fully and very interestingly reported. In the latter part of the reign of Charles II., Lord Chancellor Nottingham raised the character of the court to high reputation, and established both its jurisprudence and its jurisdiction upon wide and rational foundations. We have but few reports of his decisions that are worthy of his fame. They are dispersed through several works of inferior authority. It is from his time, however, that equity became a regular and cultivated science, and the judicial decisions in chancery are to be carefully studied.

Vernon's Reports are the best of the old reports in chancery. They were published from his manuscripts, after his death, by order of Chancellor King, and were found to be quite imperfect and inaccurate. In 1806, Mr. Raithby favored the profession with a new and excellent edition of Vernon, enriched by learned notes and accurate extracts from the register's books, so that the volumes assumed a new dress, and more unquestionable authenticity. Those reports include part of the judicial administration of Lord Nottingham, and the whole of the time of Lord Somers; *but they give us nothing equal to *493 the reputation of those great men. They bring the series of equity decisions down to the conclusion of Lord Chancellor Cowper's judicial life. Vernon.

Precedents in Chancery is a collection of cases between 1689 and 1722; and the author of those reports, and of the first volume of Equity Cases Abridged, is generally supposed to be the same person. They are works which contain very brief cases, in comparison with the voluminous details of modern reports; but they are of respectable authority. (*a*) Peere Williams's Reports extend from the beginning of the last century to the year 1735, and they embrace the period of the decisions of a succession of eminent men, who presided in chancery in the former part of that century. The note of Mr. Cox to the fourth edition of these reports gave to that edition the character of being the best edited book on the law. Even before his learn- Precedents in Chancery. Peere Williams.

(*a*) 1 Vesey, 547; 3 Vesey, 285; 5 Vesey, 664.

ing and industry had given new character and value to the reports of Peere Williams, they were regarded as one of the most perspicuous, useful, and interesting repositories of equity law to be found in the language.

Moseley. Moseley's Reports of cases during the time of Lord King have received a various and contradictory character and treatment. Lord Mansfield said it was a book not to be quoted; but Lord Eldon, who is presumed to have been a better judge of the merits of the work, says that Moseley is a book of considerable accuracy. (*b*) It is fortunate that we have even so imperfect a view of the decisions of Lord King, who was an eminent scholar, and to whom Mr. Locke bequeathed his papers and library.

Talbot. Lord Talbot presided in chancery but a very few years. He was a pure and exalted character, who died in the vigor of his age, and his loss was lamented as a great national calamity. The cases during his time, under the title of Cases tempore Talbot, are well reported, and have a reputation for accuracy.

*494 * Lord Hardwicke, the successor of Lord Talbot, held the great seal for upwards of twenty years, and the present wise and rational system of English equity jurisprudence owes more to him than perhaps to any of his predecessors. His decisions are

Vesey and Atkyns. reported in the elder Vesey and Atkyns, and partly in Ambler and Dickens; and though none of them are eminent reporters, either for accuracy or precision in the statements of the cases, or in giving the judgment of the court, (*a*) yet the value of his opinions, and the great extent of his learning, and the solidity of his judgment, have been sufficiently perceived and understood. There is no judge in the judicial annals of England whose judicial character has received greater and more constant homage. His knowledge of the law, said a very competent judge, was most extraordinary, and he was a consummate master of the profession. (*b*) His decisions, at this day, and in our own courts, do undoubtedly carry with them a more commanding weight of authority than those of any other judge; and the best editions of

(*b*) 3 Anst. 861; 5 Burr. 2629; 1 Meriv. 92.

(*a*) Buller J., in 6 East, 28 n.; Sir J. Mansfield, in 5 Taunt. 64; 4 Vesey, 138, n.; Preface to Eden's Rep.; 1 Sch. & Lef. 240.

(*b*) Lord Kenyon, 7 Term Rep. 416.

the elder Vesey and Atkyns will continue to fix the attention and study of succeeding ages.

Eden's Reports of the decisions of Lord Northington, the successor to Lord Hardwicke, are very authentic, and highly esteemed. They surpass in accuracy the reports either of Ambler or Dickens within the same period; and the authority of Lord Northington is very great, and it arose from the uncommon vigor and clearness of his understanding. The next book of reports of deserved celebrity is Brown, commencing with Lord Thurlow's appointment to the office of chancellor; and the high character of the court at that period gave to those reports a very extensive authority and circulation, for which they were indebted more to the reputation of the chancellor than to any merit in the execution of the work. Cox's Cases in Chancery give us the * decisions of Lord Kenyon, while he was master of the rolls under Thurlow, as well as the decisions of the Lord Chancellor during the same period. They were intended as a supplement to the reports of Brown and the younger Vesey, so far as those reports covered the period embraced by the cases, and they are neat, brief, and perspicuous reports, of unquestionable accuracy. A new and greatly improved edition has lately been published in New York, under the superintendence of one of the masters in chancery.

Eden. Brown. * 495 Cox.

The Reports of the younger Vesey extend over a large space of time, and contain the researches of Sir Richard Pepper Arden, as master of the rolls, and the whole of the decisions of Lord Loughborough, and carry us far into the time of Lord Eldon. These reports are distinguished for their copiousness and fidelity. The same character is due to the reports of his successors; and though great complaints have been made at the delay of causes, arising from the cautious and doubting mind of the present (*a*) venerable Lord Chancellor of England, it seems to be universally conceded, that he bestows extraordinary diligence in the investigation of immense details of business, and arrives in the end at a correct conclusion, and displays a most comprehensive and familiar acquaintance with equity principles. It must, nevertheless, be admitted that the reports of Lord Eldon's administration in equity, amounting to perhaps thirty volumes, and replete

Younger Vesey.

(*a*) 1826.

with attenuated discussion, and loose suggestions of doubts and difficulties, are enough to task very severely the patience of the profession.

There are recent reports of decisions in other departments of equity which are deserving of great attention. The character of those branches of the equity jurisdiction is eminently sustained; and the reported decisions of Lord Redesdale and Lord Manners, in the Irish Court of Chancery, are also to be placed on a level, in point of authority, with the best productions of the English bench. (*b*)

Upon our American equity reports I have only to observe, that, being decisions in cases arising under our domestic
*496 *laws and systems, they cannot but excite a stronger interest in the mind of the student; and from their more entire application to our circumstances, they will carry with them the greater authority.[1]

(*b*) The Lives of the Lord Chancellors of England, from the earliest times till the reign of George IV., in 5 vols. 8vo, London, 1846, by Lord Campbell, is the most instructive and attractive work on legal biography that is extant, and equally distinguished for its truth, its candor, and its freedom.

[1] The reports of judicial decisions, to which the attention of the American lawyer is directed, have become too numerous even to be designated in a limited note. The English Reports still retain their high rank in the lawyer's library. The alterations of our forms of pleadings, and in the rules of procedure, and the differences of our political systems, indeed, render many of the English decisions inapplicable to our circumstances; but the mass of legal questions will always remain alike in both countries. The essential principles of civil liberty belong to both; the mode of legislation in each is the same; and the system of evidence, the rights of persons, and the great body of commercial law, are common to England and America. The reports of the courts of England seemed for a while to languish, after the retirement of Lord Ellenborough, but they never exhibited the science of the law in so high and cultivated a state as at the present time. If it be not presuming in an American annotator to pretend to discriminate among the contemporary decisions, he may point out to the student, among the common-law reports, the decisions of the Court of Exchequer, since Baron Parke and his very learned associates became the judges, as worthy of the brightest period of English jurisprudence.

Since the last edition of the Commentaries appeared, the Court of Chancery of New York has ceased to exist, and with it has closed a series of Equity Reports which reflected lustre on the state, and the influence of which has pervaded the jurisprudence of the nation. The reports containing the decisions of the two most distinguished Chancellors of New York, Johnson's Reports, Paige's Reports, and Barbour's Chancery Reports, comprise the whole system of equity law, and will always be the resort and study of the American lawyer.

Of the first of those Chancellors it is unnecessary to speak to the reader of his

I have now finished a succinct detail of the principal reporters; and when the student has been thoroughly initiated in the elements of legal science, I would strongly recommend them to his notice. The old cases, prior to the year 1688, need only be occasionally consulted, and the leading decisions in them examined. Some of them, however, are to be deeply explored and studied, and particularly those cases and decisions which have spread their influence far and wide, and established principles which lie at the foundations of English jurisprudence. Such cases have stood the scrutiny of contemporary judges, and been illustrated by succeeding artists, and are destined to guide and control the most distant posterity. The reports of cases since the middle of the last century ought, in most instances, to be read in course, and they will conduct the student over an immense field of forensic discussion. They contain that great body of the commercial law, and of the law of contracts, and of trusts, which governs at this day. They are worthy of being studied even by scholars of taste and general literature, as being authentic memorials of the business and manners of the age in which they were composed. Law reports are dramatic in their plan and structure. They abound in pathetic incident, and displays of deep feeling. They are faithful records of those "little competitions, factions, and debates of mankind" that fill up the principal drama of human life; and which are engendered by the love of power, the appetite for wealth, the allurements of pleasure, the delusions of self-interest, the melan-

General merits of reports.

volumes. Most of his decisions have been transferred to his Commentaries. "*Lector, si monumentum requiris, circumspice!*"

But it may be permitted to the Editor to render his tribute of homage to Chancellor Walworth. It has been his privilege to practise under the Chancellor during his whole term of office, and to observe those high judicial qualities which have rarely been equalled. If in his demeanor, on the bench, the Chancellor was sometimes open to criticism, it was that only which has been applied to kindred genius, that "he was prevented, by his inconceivable rapidity in apprehending the opinions of others, from judging accurately of their reasonableness." This criticism, however, never approached his matured decisions, embracing the whole circle of equity. Never, perhaps, were so many decisions made, where so few were inaccurate as to facts or erroneous in law.

If it was destined that the Court of Chancery should fall under a reform which apparently designs to obliterate the history as well as the legal systems of the past, it is a consolation to reflect that it fell without imputation on its purity or usefulness, and that no court was ever under the guidance of a judge purer in character or more gifted in talent than the last Chancellor of New York.

choly perversion of talent, and the machinations of fraud. They give us the skilful debates at the bar, and the elaborate opinions on the bench, delivered with the authority of oracular wisdom. They become deeply interesting, because they contain true portraits of the talents and learning of the sages of the law.

*497 * We should have known but very little of the great mind and varied accomplishments of Lord Mansfield, if we had not been possessed of the faithful reports of his decisions. It is there that his title to the character of "founder of the commercial law of England" is verified. A like value may be attributed to the reports of the decisions of Holt, Hardwicke, Willes, Wilmot, DeGrey, Camden, Thurlow, Buller, Kenyon, Sir William Scott, Grant, and many other illustrious names, which will be immortal as the English law. Nor is it to be overlooked as a matter of minor importance, that the judicial tribunals have been almost uniformly distinguished for their immaculate purity. Every person well acquainted with the contents of the English reports, must have been struck with the unbending integrity and lofty morals with which the courts were inspired. I do not know where we could resort, among all the volumes of human composition, to find more constant, more tranquil, and more sublime manifestations of the intrepidity of conscious rectitude. If we were to go back to the iron times of the Tudors, and follow judicial history down from the first page in Dyer to the last page of the last reporter, we should find the higher courts of civil judicature, generally, and with rare exceptions, presenting the image of the sanctity of a temple, where truth and justice seem to be enthroned, and to be personified in their decrees.

LECTURE XXII.

OF THE PRINCIPAL PUBLICATIONS ON THE COMMON LAW.

The reports of adjudged cases are admitted to contain the highest and most authentic evidence of the principles and rules of the common law; but there are numerous other works of sages in the profession which contribute very essentially to facilitate the researches and abridge the labor of the student. These works acquire by time, and their intrinsic value, the weight of authority; and the earlier text-books are cited and relied upon as such, in the discussions at the bar and upon the bench, in cases where judicial authority is wanting.

Glanville.

One of the oldest of these treatises is Glanville's Tractatus de Legibus Angliæ, composed in the reign of Henry II., in which he was chief justiciary, and presided in the *aula regis*. It is a plain, dry, perspicuous essay on the ancient actions and the forms of writs then in use. It has become almost obsolete and useless for any practical purpose, owing to the disuse of the ancient actions; but it is a curious monument of the improved state of the Norman administration of justice. (*a*) It is peculiarly venerable, if it be, as it is said, the most ancient book extant upon the laws and customs of England. It has been cited, and commented upon, and extolled, by Lord Coke, Sir Matthew Hale, Sir Henry Spelman, Selden, Blackstone, and most of the eminent lawyers and antiquaries of the two last centuries. Mr. Reeves says that he incorporated the whole of Glanville into his History of the English Law.

Bracton.

Bracton wrote his treatise, De Legibus et Consuetudinibus Angliæ, in the reign of Henry II., and he is said to have been a judge itinerant in that reign, and professor of

(*a*) In the History of the Boroughs and Municipal Corporations of the United Kingdom, by Messrs. Merewether & Stephens, (vol. i. Int. 18,) all that is contained in the earlier Saxon laws, and in those of William I. and Henry I., and the charters of those periods, is said to be in a great degree repeated in Glanville, and again in Britton. Ibid. vol. i. p. 476. Dr. Irving, in his Introduction to the Study of the Civil Law, p. 93, says that Glanville's Treatise is under considerable obligation to the civil law.

*500 law at *Oxford. He is a classical writer, and has been called by a perfect judge of his merits, (a) the father of the English law, and the great ornament of the age in which he lived. His work is a systematic performance, giving a complete view of the law in all its titles, as it stood at the time it was written; and it is filled with copious and accurate details of legal learning. It treats of the several ways of acquiring, maintaining, and recovering property, much in the manner of the Institutes of Justinian. The style clear, expressive, and sometimes polished, has been ascribed to the influence of the civil and canon law, which he had studied and admired; and the work evinces, by the freedom of the quotations, that he had drank deep at those fountains.

Sir William Jones says, he is certainly the best of our juridical classics, though he is perfectly aware that Bracton copied Justinian almost word for word. (b) In the reign of Edward I., Bracton was reduced into a compendium by Thornton, which shows, says Selden, (c) how great the authority of Bracton was in the time of Edward I. He continued to be the repository of ancient English jurisprudence, and the principal source of legal authority, down to the time of the publication of the Institutes of Lord Coke.

Staunforde, in his Pleas of the Crown, published about the time of Philip and Mary, bears strong testimony to the merits and to the authority of Bracton. It is stated in Plowden, (d) that neither Glanville nor Bracton were to be cited as authorities, but rather as ornaments to the discourse; and in several other books the same thing was said. (e) But Mr. Reeves, *501 in his History of the English Law, (f) justly *vindicates the character of Bracton from such unmerited aspersion; and what is as much, and perhaps more to the purpose, the learned Selden, whose knowledge of English legal antiquities was unrivalled, declares, that this notion is founded in error.

(a) 4 Reeve's History of the English Law, p. 570.

(b) Mr. Spence, in his Equitable Jurisdiction of the Court of Chancery, vol. i. 118–132, considers that Bracton drew the learning of his treatise, not from the Anglo-Saxon or Anglo-Norman jurisprudence, but essentially from the Roman law.

(c) Dissertation annexed to Fleta, c. ii. sec. 1.

(d) P. 357, 358.

(e) 1 Show. 118; 11 St. Tri. 143.

(f) Vol. iv. pp. 570, 571.

Glanville and Bracton are authors of great service to all who apply themselves to the study of the law, and are desirous of knowing its origin and progress from the very foundation. (*a*) They contain numberless things, said Selden, which in his day either remained entire, or were only partially abrogated; and they contain such information on ancient customs and laws, as to carry with them authority as well as illustration. Lord Holt, in the great case of *Coggs* v. *Bernard*, made free use of Bracton, and spoke of him as an old author full of reason and good sense.

Britton and Fleta, two treatises in the reign of Edw. I., were nothing more than appendages to Bracton, and from whom they drew largely. Lord Coke says, (*b*) that Britton was bishop of Hereford, and of profound judgment in the common law, and that Fleta was written by some learned lawyer, while in confinement in the Fleet prison. (*c*) The dissertation which Selden annexed to the edition of Fleta, printed in his time, is evidence of the high estimation in which the work was then held; and it is a little singular that President Henault, in his chronological abridgment of the History of France, (*d*) should refer to this ancient English treatise of Fleta as an historical authority. (*e*) Britton and Fleta.

Sir John Fortescue's treatise, De Laudibus Legum Angliæ, was written in the reign of Henry VI., under whom he was chief justice, and afterwards chancellor. It is in the form of a dialogue between him and the young prince, and he undertakes to show, that the common law was the most * reasonable and the most ancient in Europe, and superior to the civil law. It displays sentiments of liberty, and a * 502 Sir John Fortescue.

(*a*) Selden's Dissertations, c. 1, sec. 3.

(*b*) Pref. to 10 Co.

(*c*) Lord Campbell, in his very interesting "Lives of the Lord Chancellors," says that Britton set the example of writing law books in French, which was followed for some centuries.

(*d*) Tom. i. p. 258.

(*e*) The Mirror of Justices was said, recently, by Ch. J. Tindal, (6 Bing. N. C. 237,) to be a book of great authority, and of the earliest, though uncertain date. Lord Coke spoke of its authority and antiquity in high terms, and that most of it was written before the conquest. Pref. to 9 Co. and Pref. to 10 Co. Mr. Reeves, author of the History of the English Law, speaks of it as a curious, and in some degree authentic tract, and as compiled by Horne, under Edw. II., from some work of that kind, and legal documents in the Anglo-Saxon times.

sense of a limited monarchy, remarkable, in the fierce and barbarous period of the Lancastrian civil wars, and an air of probity and piety runs through the work. He insisted, for instance, that the conviction of criminals by juries, and without torture, was much more just and humane than the method of the continental nations; and that the privilege of challenging jurors, and of bringing writs of attaint upon corrupt verdicts, and the usual wealth of jurors, afforded that security to the lives and property of English subjects, which no other country was capable of affording. He run a parallel, in many instances, between the common and the civil law, in order to show the superior equity of the former, and that the proceedings in courts of justice were not so dilatory as in other nations. Though some of the instances of that superiority which he adduces such as the illegitimacy of antenuptial children, and the doctrine of feudal wardships, are of no consequence, yet the security arising from trial by jury, and the security of life and property by means of the mixed government of England, and the limitations of the royal prerogative, were solid and pre-eminent marks of superiority.

This interesting work of Fortescue has been translated from the Latin into English, and illustrated with the notes of the learned Selden; and it was strongly recommended, in a subsequent age, by such writers as Sir Walter Raleigh and St. Germain. And while upon this author, we cannot but pause and admire a system of jurisprudence which, in so uncultivated a period of society, contained such singular and invaluable provisions in favor of life, liberty, and property as those to which Fortescue referred. They were unprecedented in all Greek and Roman antiquity, and, being preserved in some tolerable degree of freshness and vigor, amidst the profound ignorance and licentious spirit of the feudal ages, they justly entitle the common law to a share of that constant and vivid eulogy which the
* 503 English lawyers *have always liberally bestowed upon their municipal institutions.

Littleton's Book of Tenures was composed in the reign of Edward IV., and it is confined entirely to the doctrines of the old English law, concerning the tenure of real estates, and the incidents and services relating thereto. In the first book, Littleton treats of the quantity of interest in estates, under the heads of fee simple, fee tail, tenant in dower, tenant by the curtesy, ten-

Littleton.

ant for life, for years, and at will. In the second book, he treats of the several tenures and services by which lands were then held, such as homage, fealty, villenage, and knight service. In the third book, he treats of divers subjects relative to estates and their tenures, under the heads of parceners, joint tenants, estates on condition, releases, warranty, &c. He explained the learning of that period on the subject of tenures and estates, with a felicity of arrangement, and perspicuity and precision of style, that placed him above all other writers on the law. No work ever attained a more decided and permanent reputation for accuracy and authority. Lord Coke says, (*a*) that Littleton's Tenures was the most perfect and absolute work, and as free from error as any book that ever was written on any human science; and he is justly indignant at the presumptuous and absurd censures which the celebrated civilian, Hotman, was pleased to bestow on Littleton's clear and accurate view of English feudal tenures. He said he had known many of his cases drawn in question, but never could find any judgment given against any of them, which could not be affirmed of any other book in our law. The great excellence of Littleton is his full knowledge of the subject, and the neatness and simplicity of his manner. He cites but very few cases, but he holds no opinion, says his great commentator, but what is supported by authority and reason. A great part of Littleton is not now law, or is entirely * obsolete with us; and particularly much of * 504 the matter in the chapters on estates in fee tail, copyholds, feudal services, discontinuance, attornment, remitter, confirmation, and warranty. But, even at this day, what remains concerning tenures cannot be well understood without a general knowledge of what is abolished; and even the obsolete part of Littleton can be studied with pleasure and profit by all who are desirous to trace the history and grounds of the law. It has been supposed by Mr. Butler that Littleton's treatise would still be a proper introduction to the institutes of the English law on the subject of real estates.

Perkins's Treatise of the Laws of England, written in the reign of Henry VIII., has always been deemed a valuable book for the learning and ingenuity displayed in it relating to the title and conveyance of real property. Coke said it was

Perkins.

(*a*) Preface to Co. Litt. and to 10 Co.

wittily and learnedly composed; and Lord Mansfield held it to be a good authority in point of law. It treats of grants, deeds, feoffments, exchange, dower, curtesy, devises, surrenders, reservations, and conditions; and it abounds with citations, and supports the positions laid down by references to the Year Books, and Fitzherbert's Abridgment.

Doctor and Student.

The Dialogue between a Doctor of Divinity and a Student in Law was written by St. Germain, in the reign of Henry VIII., and discusses, in a popular manner, many principles and points of common law. The seventeenth edition of this work was published in 1787, and dedicated to the younger students and professors of law. It has always been considered by the courts, and the best of the juridical writers, as a book of merit and authority. The form of writing by dialogue was much in use among the ancients, and some of the finest treatises of the Greeks and Romans were written in that form, and particularly the remains of the Socratic school in the writings of Xenophon and Plato, and the rhetorical and philosophical treatises of Cicero. The three most interesting productions, in the form of dialogue, on *505 the English law, are Fortescue, already mentioned, * this work of St. Germain, and the elegant and classical work entitled Eunomus, or Dialogues concerning the Law and Constitution of England, by Mr. Wynne.

Lord Bacon.

But the legal productions of the preceding ages were all surpassed in value and extent in the reigns of Elizabeth and James by the results of the splendid talents and immense erudition of Bacon and Coke. The writings of Lord Bacon on the municipal law of England are not to be compared in reputation to his productions in physical and moral science; but it is nevertheless true, that he shed light and learning, and left the impression of profound and original thought on every subject which he touched. It was the course of his life to connect law with other studies, and, therefore, he admitted that his arguments might have the more variety, and perhaps the greater depth of reason. His principal law tracts are, his Elements of the Common Law, containing an illustration of the most important maxims of the common law, and of the use of the law in its application to the protection of person, property, and character, and his Reading upon the Statute of Uses. Lord Bacon seems to have disdained to cite authorities in his law treatises; and in that respect he ap-

proved of the method of Littleton and Fitzherbert, and condemned that of Perkins and Staunforde. (*a*) He admits, however, that in his own private copy he had all his authorities quoted, and that he did sometimes "weigh down authorities by evidence of reason"; and that he intended rather to correct the law than soothe received error, or endeavor to reconcile contradictions by unprofitable subtlety. He made a proposal to King James, for a digest of the whole body of the common and statute law of England; and if he had been encouraged and enabled to employ the resources of his great mind on such a noble work, he would have done infinite service to mankind, and have settled in his favor the question, * which he said would be made with posterity, * 506 whether he or Coke was the greater lawyer. The writings of Lord Bacon are distinguished for the perspicuity and simplicity with which every subject is treated.

Lord Coke's Institutes have had a most extensive and permanent influence on the common law of England. The first part is a commentary upon Littleton's Tenures; and, notwithstanding the magnitude of the work, it has reached seventeen editions. Many of the doctrines which his writings explain and illustrate have become obsolete, or have been swept away by the current of events. The influence of two centuries must inevitably work a great revolution in the laws and usages, as well as in the manners and taste of a nation. Perhaps everything useful in the Institutes of Coke may be found more methodically arranged, and more interestingly taught, in the modern compilations and digests; yet his authority on all subjects connected with the ancient law is too great and too venerable to be neglected. The writings of Coke, as Butler has observed, (*a*) stand between and connect the ancient and the modern law, — the old and new jurisprudence. He explains the ancient system of law as it stood in his day, and he points out the leading circumstances of the innovation which was begun. We have in his works the beginning of the disuse of real actions; the tendency of the nation to abolish the military tenures; the rise of a system of equity jurisdiction, and the outlines of every point of modern law.

Coke's Institutes.

The second part of the Institutes of Coke is a commentary upon the ancient statutes, beginning with Magna Charta, and proceed-

(*a*) Preface to his Law Tracts.

(*a*) Pref. to Co. Litt.

ing down to the reign of Henry VIII.; and his commentaries upon the ancient statutes consisted, as he himself declared, of the authentic resolutions of the courts of justice, and were not like the glosses of the civilians upon the text of the civil law,
* 507 which contain so many diversities * of opinion as to increase rather than to resolve doubts and uncertainties. His commentary upon Magna Charta, and particularly on the celebrated 29th chapter, is deeply interesting to the lawyers of the present age, as well from the value and dignity of the text, as the spirit of justice and of civil liberty which pervades and animates the work. In this respect, Lord Coke eclipses his contemporary and great rival, Lord Bacon, who was as inferior to Coke in a just sense and manly vindication of the freedom and privileges of the subject, as he was superior in general science and philosophy. Lord Coke, in a very advanced age, took a principal share in proposing and framing the celebrated Petition of Right, containing a parliamentary sanction of those constitutional limitations upon the royal prerogative which were deemed essential to the liberties of the nation.

The third and fourth parts of the Institutes treat of high treason and the other pleas of the crown, and of the history and antiquities of the English courts. The harshness and severity of the ancient criminal code of England are not suited to the taste and moral sense of the present age; and those parts of the Institutes are of very inconsiderable value and use, except it be to enlighten the researches of the legal antiquary. In this respect, Coke's Pleas of the Crown are inferior to the work under that title by Staunforde, who wrote in the age of Philip and Mary, and was the earliest writer who treated didactically on that subject. Staunforde wrote in law French; but Lord Coke, more wisely and benevolently, wrote in English, because, he said, the matter of which he treated concerned all the subjects of the realm.

Before we quit the period of the old law, we must not omit to notice the grand abridgments of Statham, Fitzherbert,
† Statham. and Brooke. Statham was a baron of the Exchequer, in the time of Edward IV. His abridgment of the law was a digest of most titles of the law, comprising under each head adjudged cases from the Year Books, given in a concise manner. The cases were strung together without regard to connection
* 508 of matter. It is doubtful whether it was * printed before

or after Fitzherbert's work, but the latter entirely superseded it. Fitzherbert was published in the reign of Henry VIII., and came out in 1514, and was, for that period, a work of singular learning and utility. Brooke was published in 1573, and in a great degree superseded the others. The two last abridgments contain the substance of the Year Books regularly digested; and by the form and order which they gave to the rude materials before them, and the great facility which they afforded to the acquisition of knowledge, they must have contributed very greatly and rapidly to the improvement of legal science. Even those exceedingly laborious abridgments were in their turn superseded by the abridgments of Rolle and his successors. Dr. Cowell, who was contemporary with Coke, published in Latin an Institute of the Laws of England, after the manner of Justinian's Institutes. His work was founded upon the old feudal tenures, such as the law of wards and liveries, tenures *in capite*, and knight service. While the writings of Lord Coke have descended with fame and honor to posterity, it was the fate of the learned labors of Dr. Cowell to pass unheeded and unknown into irreclaimable oblivion. (*a*) And, with respect to all the preceding periods, Reeves's History of the English Law contains the best account that we have of the progress of the law, from the time of the Saxons to the reign of Elizabeth. It covers the whole ground of the law included in the old abridgments, and it is a work deserving of the highest

Fitzherbert.

Brooke.

Cowell.

Reeves.

(*a*) Dr. Cowell published a Law Dictionary, or the Interpreter of Words and Terms used either in the Common or Statute Law, and in the Tenures. Cowell's Interpreter is frequently cited by the English antiquarians, and Mr. Selden makes much use of it in his notes to Fortescue. It is one of the authorities used by Jacob in compiling his Law Dictionary; but the first edition under James I. met with the singular fate of being suppressed by a proclamation of the King, at the instance of the House of Commons, for containing the heretical and monstrous doctrine that the king was an absolute monarch, and above the law, which he might alter or suspend at his pleasure.[1]

[1] In December, 1850, a new "Law Dictionary and Glossary, containing full Definitions of the principal Terms of the Common and Civil Law," by Alexander M. Burrill, Esq., was published in New York. This work exhibits antiquarian learning and legal erudition, rare in American productions; and, while its accurate definitions and practical suggestions render it useful to the lawyer, its historical lore and researches into recondite sources of learning commend it to a place in the library of the general scholar.

*509 commendation. * I am at a loss which most to admire, the full and accurate learning which it contains, or the neat, perspicuous, and sometimes elegant style in which that learning is conveyed.

Finch's Discourse.

The treatise of Sir Henry Finch, being a discourse in four books, on the maxims and positive grounds of the law, was first published in French, in 1613; and we have the authority of Sir William Blackstone for saying, that his method was greatly superior to that in all the treatises that were then extant. His text was weighty, concise, and nervous, and his illustrations apposite, clear, and authentic. But the abolition of the feudal tenures, and the disuse of real actions, have rendered half of his work obsolete.

Sheppard's Touchstone.

Sheppard's Touchstone of Common Assurances was the production of Mr. Justice Dodderidge, in the reign of James I. It is a work of great value and authority, touching the common-law modes of conveyance, and those derived from the statute of uses. It treats also copiously of the law of uses and devises; but the great defect of the book is the want of that lucid order and perspicuous method which are essential to the cheerful perusal and ready perception of the merits of such a work. The second volume of Collectanea Juridica has an analysis of the theory and practice of conveyancing, which is only a compendious abridgment of the Touchstone; and there is a very improved edition of it by Preston, who has favored the profession with several excellent tracts on the law of real property.

Rolle's Abridgment.

Rolle's Abridgment of the Law was published soon after the restoration, with an interesting preface by Sir Matthew Hale. It brings down the law to the end of the reign of Charles I., and though it be an excellent work, and, in point of method, succinctness, and legal precision, a model of a good abridgment, Sir Matthew Hale considered it an unequal monument of the fame of Rolle, and that it fell short of what might have been expected from his abilities and great merit. It is also deemed by Mr. Hargrave a great defect in Viner's very extensive

*510 abridgment, that he should * have attempted to engraft it on such a narrow substance as Rolle's work. Rolle was Chief Justice of England under the protectorate of Cromwell, and under the preceding commonwealth; but as his abridgment was printed in the reign of Charles II., he has no other title annexed

to his name than that of Sergeant Rolle, and his republican dignity was not recognized.

Since the period of the English revolution, the new digests have superseded the use of the former ones; and Bacon, Viner, Comyns, and Cruise contain such a vast accession of modern law learning, that their predecessors have fallen into oblivion. Viner's Abridgment, with all its defects and inaccuracies, is a convenient part of every lawyer's library. We obtain by it an easy and prompt access to the learning of the Year Books and the old abridgments, and the work is enriched with many reports of adjudged cases not to be found elsewhere; but, after all that can be said in its favor, it is an enormous mass of crude, undigested matter, and not worth the labor of the compilation. The Digest of Lord Chief Baron Comyn is a production of vastly higher order and reputation, and it is the best digest extant upon the entire body of the English law. Lord Kenyon held his opinion alone to be of great authority, for he was considered by his contemporaries as the most able lawyer in Westminster Hall. (*a*) The title Pleader has often been considered as the most elaborate and useful head of the work; but the whole is distinguished for the variety of the matter, its lucid order, the precision and brevity of the expression, and the accuracy and felicity of the execution. Bacon's Abridgment was composed chiefly from materials left by Lord Chief Baron Gilbert. It has more of the character of an elementary work than Comyn's Digest. The first edition appeared in 1736, and was much admired, and the abridgment has maintained its great influence down to the present time, as being

Viner.

Comyn's Digest.

Bacon's Abridgment.

* a very convenient and valuable collection of principles, * 511
arising under the various titles in the immense system of the English law. And in connection with this branch of the subject, it will be most convenient, though a little out of the order of time, to take notice of Cruise's recent and very valuable Digest of the Laws of England respecting Real Property. It is by far the most perfect elementary work of the kind which we have on the doctrine of real property, and it is distinguished for its methodical, accurate, perspicuous, and comprehensive view of the subject. All his principles are supported and illustrated by

Cruise's Digest.

(*a*) 3 Term Rep. 64, 631.

the most judicious selection of adjudged cases. They are arranged with great skill, and applied in confirmation of his doctrines with the utmost perspicuity and force.

Baron Gilbert.

The various treatises of Lord Chief Baron Gilbert are of high value and character, and they contributed much to advance the science of law in the former part of the last century. His treatise on Tenures deserves particular notice, as having explained, upon feudal principles, several of the leading doctrines in Littleton and Coke; and it is a very elementary and instructive essay upon that abstruse branch of learning. His Essay on the Law of Evidence is an excellent performance, and the groundwork of all the subsequent collections on that subject; and it still maintains its character, notwithstanding the law of evidence, like most other branches of the law, and particularly the law of commercial contracts, has expanded with the progress and exigencies of society. His treatise on the Law of Uses and Trusts is another work of high authority, and it has been rendered peculiarly valuable by the revision and copious notes of Mr. Sugden.

Hale and Hawkins.

The treatises on the Pleas of the Crown, by Sir Matthew Hale and Sergeant Hawkins, appeared early in the last century, and they contributed to give precision and certainty to that most deeply interesting part of jurisprudence. They are both of them works of authority, and have had great sanc-
* 512 tion, and been uniformly and strongly recommended * to the profession.

Sir Martin Wright.

Sir Martin Wright's Introduction to the Law of Tenures is an excellent work, and the value of it cannot be better recommended than by the fact that Sir William Blackstone has interwoven the substance of that treatise into the second volume of his Commentaries. Dr. Wood published, in 1722, his Institutes of the Laws of England. His object was to digest the law, and to bring it into better order and system. By the year 1754, his work had passed through eight folio editions, and thereby afforded a decisive proof of its value and popularity. It was greatly esteemed by the lawyers of that age; and an American judge, (*a*) (himself a learned lawyer of the old school,) has spoken of Wood as a great authority, and of weight and respect in Westminster Hall.

(*a*) M'Kean C. J., 1 Dallas, 357.

But it was the fate of Wood's Institutes to be entirely superseded by more enlarged, more critical, and more attractive publications, and especially by the Commentaries of Sir William Blackstone, who is justly placed at the head of all the modern writers who treat of the general elementary principles of the law. By the excellence of his arrangement, the variety of his learning, the justness of his taste, and the purity and elegance of his style, he communicated to those subjects which were harsh and forbidding in the pages of Coke the attractions of a liberal science, and the embellishments of polite literature. The second and third volumes of the Commentaries are to be thoroughly studied and accurately understood. What is obsolete is necessary to illustrate that which remains in use, and the greater part of the matter in those volumes is law at this day, and on this side of the Atlantic.[1] Blackstone.

I have necessarily been obliged to omit the mention of many valuable works upon law, as my object in the present lecture was merely to select those which were the most useful or distinguished. With respect to the modern didactic *treatises *513 on various heads of the law, and which have multiplied exceedingly within the period of the present generation, I can only take notice of a few of those which relate to the law of real property, and are deemed the most important. The numerous works, both foreign and domestic, on various branches of the law of personal rights and commercial contracts, I may have occasion to refer to hereafter, as the subjects of which they treat pass under consideration, in the course of these lectures. Any critical notice of them at present would lead us too far from the general purpose of this inquiry, and many of them are not sufficiently matured by time to become of much authority. Modern treatises.

Sanders's Essay on Uses and Trusts is a comprehensive and sys tematic treatise, but it wants that fulness of illustration, and neat and orderly arrangement, requisite in the discussion of so abstruse and complicated a branch of the law. The learned Mr. Butler has

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1 "Till of late," says Lord Mansfield, "I could never, with any satisfaction to myself, point out a book proper for the perusal of a student; but since the publication of Mr. Blackstone's Commentaries, I can never be at a loss." Holliday's Life of Mansfield, 89.

"His Commentaries," says Sir William Jones, "are the most correct and beautiful outline that ever was exhibited of any human science."

given a very elaborate note on the same subject; (*a*) and there is an excellent summary of the law of uses and trusts in Cruise's Digest, arranged with his customary skill, and supported by an accurate analysis of adjudged cases, which are apposite and pertinent to the inquiry.

Sugden's Practical Treatise on Powers is the best book we have on that very abstruse title in the law. It was regarded by the author as his favorite performance, and he is entitled to the gratitude of the student for his masterly execution of the work. It is perspicuous, methodical, and accurate. Mr. Sugden's Treatise on the Law of Vendors and Purchasers is also a correct and useful collection of equity principles on a subject extremely interesting, and of constant forensic discussion. (*b*) Roberts, on Fraudulent Conveyances, covers a very important head in the jurisprudence of the courts of equity. He has collected the cases arising under the statutes of 13 and 27 Elizabeth, respecting conveyances
*514 that are deemed fraudulent in respect to creditors * and purchasers; and though the treatise is written in bad taste, it is a useful digest of the law on that subject. Powell's Essay upon the Learning of Devises contains a systematical and valuable view of an important branch of the law concerning title to real property, and it is enlivened with some spirited discussions; but neither the essay, nor the one of his upon Mortgages, are to be compared to the clear, succinct, and masterly analysis of the cases under similar titles, in the great work of Mr. Cruise. Fearne's Essay on Contingent Remainders and Executory Devises is a performance of a very superior character. It is eminently distinguished for the ability and perspicuity with which it unfolds and explains the principles of the most intricate parts of the law. Mr. Preston's recent Essays on Estates and Abstracts of Title contain sound and clear views of the law of real property, and they have already attained the authority of works of established reputation.

I have thus attempted, for the assistance of the student, to unfold, in this and the preceding lecture, the principal sources

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(*a*) Note 231 to lib. 3 Co. Litt.

(*b*) In 2 Molloy, 561, Lord Ch. Hart, as late as 1829, spoke very disparagingly of Sugden's Treatise on Vendors and Purchasers, by saying that it was not to be cited as an authority *per se*. This was going quite as far as decorum would warrant, considering that Mr. Sugden had been his immediate predecessor on the Irish Chancery Bench.

from which we derive the evidence and rules of the common law. There is another source still untouched, from which a great accession of sound principles, particularly on the subject of personal contract, has been received, to enlarge, improve, and adorn our municipal codes. I allude to the body of the civil law contained in the Institutes, Digest, and Code of Justinian; and our attention will be directed to that subject in the next lecture.

LECTURE XXIII.

OF THE CIVIL LAW.

The great body of the Roman or civil law was collected and digested by order of the Emperor Justinian, in the former part of the sixth century. That compilation has come down to modern times, and the institutions of every part of Europe have felt its influence, and it has contributed largely, by the richness of its materials, to their character and improvement. With most of the European nations, and in the new states in Spanish America, in the province of Lower Canada, (*a*) and in one of the United States, (*b*) it constitutes the principal basis of their unwritten or common law. It exerts a very considerable influence upon our own municipal law, and particularly on those branches of it which are of equity and admiralty jurisdiction, or fall within the cognizance of the surrogate's or consistorial courts. (*c*)

The history of the venerable system of the civil law is peculiarly interesting. It was created and gradually matured on the banks of the Tiber, by the successive wisdom of Roman statesmen, magistrates, and sages; and after governing
*516 *the greatest people in the ancient world for the space of thirteen or fourteen centuries, and undergoing extraordinary vicissitudes after the fall of the western empire, it was revived, admired, and studied in modern Europe, on account of

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(*a*) Real property law in Canada, under French grants, was established upon the basis of the Coutume de Paris, with feudal burdens. The French civil law, as it existed in Canada at the time of the conquest of the province, still prevails, without any of the ameliorations of the code Napoleon.

(*b*) See the Civil Code of the state of Louisiana, as adopted in 1824.

(*c*) The Roman law is blended with that of the Dutch, and carried into their Asiatic possessions; and when the island of Ceylon passed into the hands of the English, justice was directed to be administered according to the former system of laws in the Dutch courts; and Van Leeuwen's Commentaries on the Roman Dutch law were translated into English in 1820, expressly for the benefit of the English judiciary in that island.

For a masterly account of the history and character of the Roman civil law, the student should consult the 44th chapter of Gibbon's Decline and Fall of the Roman Empire.

the variety and excellence of its general principles. It is now taught and obeyed, not only in France, Spain, Germany, Holland, and Scotland, but in the islands of the Indian Ocean, and on the banks of the Mississippi and the St. Lawrence. So true, it seems, are the words of D'Aguesseau, that "the grand destinies of Rome are not yet accomplished; she reigns throughout the world by her reason, after having ceased to reign by her authority."

My design in the present lecture is to make a few general observations on the history and character of the civil law, in order to excite the curiosity and direct the attention of the student to the proper sources of information on the subject. The acquaintance which I have with that law is necessarily very imperfect; and I am satisfied that no part of it can be examined, and no one period of its history can be touched, by a person not educated under that system, without finding himself at once admonished of the difficulty and delicacy of the task, by reason of the overwhelming mass of learning and criticism which presses upon every branch of the inquiry.

That part of the Roman jurisprudence which has been denominated the ancient, embraced the period from the foundation of the city by Romulus to the establishment of the twelve tables.

The fragment of the Enchiridion inserted in the Pandects, (*a*) is the only ancient history of the first ages of the Roman law now extant. It was composed by Pomponius, in the second century of the Christian era, and rescued from oblivion by Justinian; and Bynkershoek has republished it, and endeavors to restore the integrity of the original text by emendations and a critical commentary. (*a*) From this fragment we learn that Sextus, or Caius Papirius, who was a pontifex maximus about the time of the expulsion of Tarquin, made a collection of the *leges regiæ*, or laws and usages of the Romans under their kings, and which was known by the name of the Jus Civile Papirianum. Very few, if any fragments of this original collection by Papirius now remain, though efforts have been made to restore, if possible, some portion of these early Roman laws. (*b*) Such a work was evidence of great progress in

Early Roman law.

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(*a*) Dig. lib. 1, tit. 2. *De origine juris.*

(*a*) *Prætermissa ad leg.* 2 D. *De origine juris.* Opera, tom. i. 301.

(*b*) Heinecc. Antiq. Rom. Jur. Proæm. sec. 1 and 2. Hist. Jur. Civ. lib. i. sec. 15, 16.

jurisprudence under the kings, and it must have contained an account which would have been at the present day most deeply interesting and curious, of the primitive institutions of a city destined to become the mistress of the world. (*c*)

The genius of the Roman government and people had displayed itself by the time of the expulsion of their kings, and the foundations of their best institutions and discipline had been laid. The Roman people were originally, or very early in their history, divided into three tribes and thirty curiæ, and the patrician order and the Roman senate were instituted under Romulus, and that last body became in process of time the most powerful and majestic tribunal in all antiquity. (*d*) The general assemblies of
* 518 the people or *comitia* were * a part of the primitive government, and a very efficient portion of the legislative power, and they met in their *curiæ*, parishes or wards, and the vote of every citizen belonging to the curiæ was equal in these *comitia curiata*. The senate was a select body of three hundred of the elder citizens, from the heads of the clans or *gentes*, and regard was had to rank, birth, property, honor, and age. The king was elected for life by the curiæ, upon the nomination of the senate, and the laws of the *comitia* conferred upon him the powers of a civil and military chief. (*a*) The fecial and other colleges

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(*c*) Gibbon, in his History, vol. viii. p. 5, note, denies altogether the fact of any such original compilation by Papirius. Niebuhr, on the other hand, though he treats much of the early Roman history as a legend, says, that the high antiquity of the collection of the laws of the kings, compiled by Papirius, seems unquestionable. History of Rome, vol. i. p. 211, (Eng. edit.) I am incompetent to decide such a question. It is cited as an original and authentic work by Pomponius, who had infinitely better means of knowledge than any modern writer; and it is assumed to be so by such master critics as Bynkershoek and Heineccius; and yet the singular learning and acuteness of Gibbon give almost overbearing weight to his critical opinions.

(*d*) Cic. de Republica, b. 2. *In hoc orbis terræ sanctissimo, gravissimoque concilio.* Cic. in Cat.

(*a*) I have followed Dionysius of Halicarnassus, Livy, Cicero, and the other authors of the classical ages, in respect to the early political and legal history of Rome; and I have not been inclined to adopt the historical scepticisms of some modern antiquaries, (of whom Niebuhr may be placed at the head,) so far as to reject as fable what the classics have taught us concerning the civil and political institutions of the earlier Romans. The account in the text of the mixed monarchy of Rome, under the kings, is confirmed by Niebuhr himself. Hist. of Rome, vol. i. pp. 290–295, English edit. Camb. 1828. He holds, however, contrary to the received opinion, that the *curiæ* were assemblies of the patricians, or *gentes*, or heads of families, and not of the whole people; and that the *Plebs* were landholders of the neighboring towns and country, and field-laborers, who were free, and above the degree or condition of the

established by Numa bound the Romans to religious discipline. (*b*) Servius Tullius divided the people into six classes, and one hundred and ninety-three centuries, and this was a most important change in the Roman polity. The first class contained the patricians, knights, and rich citizens, * and ninety- *519 eight centuries; the *Plebs* were also now admitted to a vote in the legislature, and when the people assembled by centuries in their *comitia centuriata*, (as they generally did thereafter when called by the consuls or senate,) they voted by centuries; and the first class, containing a majority of all the centuries, if unanimous, dictated the laws. This arrangement threw the powers of government into the hands of the patrician order, and of men of property. (*a*)

After the establishment of the republic, all the higher magistrates were elected by the burghers or patricians in their *curiæ*, or by the whole people in the *comitia centuriata*, which were convoked

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clients attached to the patricians, but that they had no vote. Niebuhr's work is so intermixed with true and fabulous story, and he goes so deeply into the "tangled thickets of the forest," that it becomes rather difficult to know what is and what is not to be deemed genuine history, amid his incessant scepticisms and complicated narration. I am quite reconciled to the observation of Dr. Arnold, in his profound and learned "History of Rome," vol. i. 100, that, "although the legends of the early Roman story are neither historical nor yet coeval with the subjects which they celebrate, still their fame is so great, and their beauty and interest so surpassing, that it would be unpardonable to sacrifice them altogether to the spirit of inquiry and of fact, and to exclude them from the place which they have so long held in Roman history."

(*b*) *Numa religionibus et divino jure populum devinxit.* Tac. Ann. 3, 26. According to Cicero, the auspices, religious ceremonies, courts of justice, appeals to the people, the senate, and the whole military discipline, were instituted by royal authority, as early as the foundation of the city. He imputes the institution of the auspices and the senate particularly to Romulus. Tusc. Quæst. lib. iv. 1. De Repub. lib. ii. sec. 9, 10, 14. He says, further, that *Numa was the author of laws which were then extant!* Ibid. lib. v. sec. 2. He regarded the office of augur as one of the most important in the commonwealth; for the augurs, as he observed, had power to dismiss the *comitia*, and to command the consuls to lay down their office, and to grant or refuse permission to form treaties, and to abrogate laws not legitimately executed. No edict of the magistrates, relating to domestic or foreign affairs, could be ratified without their authority. Ibid. lib. 2. Fuss on Roman Antiquities, edit. Oxf. 1840, pp. 164, 165.

(*a*) *Eosque ita disparavit,* says Cicero, (that is, he so distributed the citizens in classes,) *ut suffragia non in multitudinis, sed in locupletium potestate essent; curavitque, quod semper in republica tenendum est, ne plurimum valeant plurimi.* De Repub. lib. ii. sec. 22. Cicero seems to have been aware of the danger to property from universal and equal suffrage, — *Ita nec prohibebatur quisquam jure suffragii: et is valebat in suffragio plurimum, cujus plurimum intererat esse in optimo Statu civitatem.* Ibid.

by the consuls, and they presided in them, counted the votes, and declared the result; and their resolutions were *leges* of the highest authority, and binding on the whole community. After the institution of tribunes, the assemblies of the people were frequently convoked by tribes, and there all the people met on an equality, and voted *per capita*. In the *comitia tributa*, the people, after violent struggles, elected the tribunes and subordinate magistrates, and enacted *plebiscita*, binding on the plebeians alone, until the Hortensian law made the decrees of the people in their *comitia tributa* binding equally on patricians and plebeians. (*b*)

As the whole administration of justice, civil and criminal, had been transferred from the kings to the consuls, it soon became necessary to control the exercise of this formidable power. *520 This was done by the Valerian law, proposed by *the consul Valerius Publicola, granting to persons accused of capital crimes a right of appeal from the judgment of the consuls to the people. It then became an established principle in the Roman constitution, that no capital punishment could be inflicted upon a Roman citizen without the vote of the people, though the consuls retained the power of inflicting very severe imprisonment. (*a*) The Valerian law became an imperfect *palladium* of civil liberty, and was in some respects analogous to the *habeas cor-*

(*b*) Dig. 1, 2, 2, 8; Gravina, de Ortu et Prog. Jur. Civ. sec. 28. The *plebiscita*, prior to the Hortensian law, required the sanction of the senate and of the assembly of the *curiæ* to be binding on all orders in the state. As the *comitia curiata* were assemblies of the patricians and plebeians, and in which all the great offices and powers of sovereignty were conferred, the *comitia tributa* were assemblies of the plebeians only, and were held independently of patrician magistrates and influence. They could be held without a previous *senatus consultum*, and were not subject to the check of the auspices, which were under the management of the patricians. The *comitia centuriata* embraced all the orders of the state, and all persons of an age for military service, and the patricians and their clients, and plebeians, all found a place in them. In the *comitia tributa* the votes were taken by tribes, and in the *comitia curiata* by *curiæ*. The patricians exercised controlling influence in the *comitia centuriata* by means of the votes of their clients. The increase of the numbers and wealth of the *clients* of the burghers or patricians gave the *comitia centuriata* in which they voted, in the progress of time, a popular character and influence; for though the clients lost their order and tribe by becoming dependent clients, they became wealthy, for they could follow retail trade and manufactures; and the *comitia* of centuries, in which the commons formed every century except six, grew to be assimilated, in a great measure, to those of the tribes. Arnold's Hist. of Rome, vol. i. 140, 141.

(*a*) Dig. 1, 2, 2, 16. The Roman dominion was absolute after a mile beyond the walls of the city, and the magistrates wielded the sword with full sovereignty. Arnold's Hist. vol. iii. 10.

pus act in the English law; but the appointment of a dictator was a suspension of the law. (*b*)

As the royal laws collected by Papirius had ceased to operate, except indirectly by the force of usage; and as the Romans, for twenty years after the expulsion of Tarquin, had been governed without any known public rules, (*c*) they began to suffer the evils of uncertain and unsteady laws, and of the absolute and capricious power of the consuls beyond the walls of the city. The call for a written law was a long time resisted on the part of the magistrates and senate; but it was at last complied with, and a commission of three persons, by the joint consent of the senate and tribunes, was instituted to form a system of law. This commission gave birth to the twelve tables, which form a distinguished era in the history of the Roman law, and constitute the commencement of what has been called the middle period of the Roman jurisprudence. (*d*)

(*b*) This great law of appeal was re-enacted in the fifth consulship of M. Valerius Corvus.

(*c*) *Incerto magis jure et consuetudine quam per latam legem.* Dig. 1, 2, 3.

(*d*) The *Enchiridion* of Pomponius says, that the deputies were commissioned to seek laws from the Grecian cities; (Dig. 1, 2, 2, 4;) and the original historians, (Livy, b. 3, c. 31, 32,) and Dionysius of Halicarnassus, (Antiq. Rom. b. 10,) say, that the deputation was sent to Athens to learn the laws and institutions of Greece. Gravina, (De Ortu et Prog. Jur. Civ. sec. 32; and De Jure Nat. Gent. et xii. tabularum, sec. 23.) Heineccius, (Hist. Jur. Civ. sec. 24; and Antiq. Roman Jur. Proæm. sec. 3,) Voet, (Com. ad Pand. 1, 2, 1.) Dr. Taylor, (Hist. of the Roman Law, p. 8.) Pothier, (Præfatio seu Prolegomena in Pandectas Justinianeas, part 1, c. 1; De Legibus Antiquis,) and the generality of modern writers on Roman history and law, assume it to be a conceded fact, on the authority of Livy, Dionysius, Cicero, Pliny, and others, that the embassy went to Athens. Tacitus (Ann. 3, 27) observes generally, *accitis quæ usquam egregia*, and the deputies must have visited at least the Grecian cities in lower Italy. M. Bonaby, a learned French writer, has, however, written three dissertations upon the origin of the laws of the twelve tables, and he considers the story of a Roman deputation to Athens as fabulous. He endeavors to maintain, by an able discussion concerning the early history of the Roman constitution and laws, and by a critical and even profound examination of the laws of the twelve tables, that they were not borrowed from the jurisprudence of Athens, but that they were essentially a restoration of the ancient Roman laws under Romulus, Numa, and Servius Tullius, and which had gone into disuse under the consuls. He admits, however, that the plan of the mixed monarchy, and many of the Roman usages under the kings, had their origin in the usages of Athens and Sparta. (Mem. de l'Acad. des Inscriptions et Belles-Lettres, tom. xviii. edit. Amst. 1743.) It is worthy of observation, that this sceptical as well as learned writer does not hesitate to assume, on the authority of Dionysius of Halicarnassus, the authenticity of the history of the Roman kings. Gibbon (Hist. vol. viii. p. 8) is also decidedly of opinion that the deputation never visited Athens, and he gives plausible reasons for his belief; and though Cicero says, (De Leg. b. 2, c. 23 and 25,) that the regulations in the twelve tables

The twelve tables. The twelve tables were digested by ten decemvirs, appointed, with the consent of the commons, out of the patrician order, on the return of the deputies from Greece. They were ratified by the consent equally of the patricians and plebeians, (*e*) and they consisted partly of laws transcribed from the institutions of other nations, partly of such as were altered and accommodated to the manners of the Romans, partly of new provisions, and mainly, perhaps, of laws and usages under their ancient kings. (*f*) They were written in a style exceedingly brief,

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concerning funerals were translated from the laws of Solon, and the decemviri had adopted almost the very words of Solon, yet M. Bonaby very ingeniously relies upon Cicero, as one of the authorities in support of his hypothesis. Niebuhr, in his History of Rome, (vol. ii. edit. Phil. 1835, by Hare and Thirlwall, pp. 228 – 231,) concludes that the deputies visited Athens, but that there is no resemblance between the Attic civil law and the twelve tables, either as to personal rights or judicial proceedings. But Niebuhr was evidently in an error when he says, (vol. ii. 231, note 7,) that "nowhere does Cicero give the least hint that there was any Greek element in the twelve tables." He must have forgotten the passages from Cicero, De Legibus, to which I have referred.

(*e*) Niebuhr (Roman History, vol. ii. p. 235, edit. Phil. 1835) says that the code of the decemvirs, being approved by the senate, was brought before the centuries, and their assent was ratified by the *curiæ*, under the presidency of the colleges of priests, and the sanction of happy auspices.

(*f*) Gravina, de Ortu et Prog. J. C. sec. 32; Niebuhr's Hist. of Rome, vol. ii. 248, 251, note, 253. Niebuhr says that the twelve tables were nothing more than the ancient statutes consolidated. A learned writer of our own country, in the New York Review for October, 1839, who avows his education and shows his acquirements in the European schools of the civil law, gives very solid reasons for his opinion that the code of the twelve tables was essentially declaratory of ancient laws and usages. Fragments of the twelve tables were collected, and distributed with great accuracy under their original and proper divisions, by J. Gothofred, in a work entitled, Quatuor Fontes Juris Civilis, printed in 1653; and his collection, Heineccius says, (Antiq. Jur. Rom. Proæm. sec. 5,) is to be preferred to that of all others. His collection, distribution, and interpretation of the tables has been followed by Gravina, who has inserted the originals with a paraphrase at the conclusion of his treatise De Jure Naturali Gentium et XII. Tabularum. He has also given a copious commentary upon that collection. They were redigested and inserted at length in a voluminous L'Histoire Romaine of the Jesuits Cotrou and Rouille, and copied from them into Hooke's Roman History, b. 2, c. 27. A summary of this curious and celebrated code, which had such permanent influence on Roman jurisprudence, and is so constantly alluded to by Roman jurists, will not be unacceptable to the American student.

The 1st table related to *law suits*, and regulated the right of citation of the defendant before the prætor. The creditor, of his own authority, seized his debtor, where he found him in public, and carried him before the prætor, and if the debtor resisted, the creditor might seize and drag him. *Ambula in jus — Te in jus voco;* and if old or infirm, the plaintiff was to provide him with a jumentum, or open carriage. (But even this provision was reprobated in after ages for its severity. A. Gell. Noct. Att. 20,

elliptical, and obscure ; and they show the great simplicity of Roman manners, and are evidence of a people under a rugged

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1.) The debtor, if he wanted time, was obliged to give a caution or bail for his appearance at a future day. The prætor was to decide the cause promptly by daylight; and if the accuser wanted witnesses, he was allowed to go before his adversary's house, and to repeat his demand for three days together by loud outcry. Mr. Justice Ware, of the District Court of Maine, has given, in the case of Lane *v.* Townsend, Ware, 299, a brief account of the commencement and progress of a Roman suit in its first stages. It is an interesting examination, and sheds much learning and light on the obscure subject; and points out inaccuracies not only in Brown's Civil and Admiralty Law, but in Blackstone's Commentaries, in respect to the stipulation or bail required of the defendant in the suit. Dr. Arnold, in his History of Rome, vol. i. 280, says, that our whole knowledge of the old actions at law is derived from the Institutes of Gaius, which, in their original form, were discovered by Niebuhr in 1816.

The 2d table related to *robbery, theft, trespass, and breaches of trust.* It allowed the right to kill a robber by night. It inflicted corporal punishment and slavery on conviction of robbery, unless the parties settled with each other. Slaves, guilty of robbery, were to be thrown down the Tarpeian rock. Thefts and trespasses were punished by pecuniary mulct. Trespassers by night, on harvest or cornfields, were punished capitally, as victims to Ceres. No term of prescription gave a right to stolen goods, nor any right of a foreigner to the goods of a Roman citizen. Breaches of trust were punished with the forfeiture of double the value of the deposit.

The 3d table related to *loans, and the right of creditors over their debtors.* It prohibited more than one per cent interest for money. (The weight of authority would seem rather to be in favor of one per cent *a year,* though Montesquieu insists that interest at the time of the twelve tables was twelve per cent a year, and that the law reducing it to one per cent was passed many years afterwards. Esprit des Lois, liv. 22, c. 22. In this construction he is supported by Livy, b. 7, c. 27. But Tacitus says, that the twelve tables restrained usury to one per cent a year. Tacit. Ann. lib. vi. 16. And this is the construction given to the words *Si qui unciario fœnore amplius fœnerassit,* by the generality of commentators. Pothier's Pandectæ Justinianeæ, tom. i. Frag. XII. Tab.; Gibbon, vol. viii. p. 86, note. It is, however, a doubtful question whether the twelve tables allowed only one or twelve per cent a year. Professor Hugo, of the University of Göttingen, in his History of the Roman Law, sec. 126, inclines to the latter opinion. A recent writer on this vexatious point in Roman history holds it to be quite clear that the unical rate of interest of the Romans was an ounce in every *as* for the cylic year of ten months, that is, eight and a half per cent, equivalent to ten per cent for the civil year of twelve months. Foreign Quarterly Review, No. 22, art. 6. This is the conclusion to which Niebuhr and Dr. Arnold arrive. (History of Rome, by N. vol. iii. 53, 57; History of Rome, by A. vol. i. 284.) The debtor was to have thirty days after judgment to pay his debt; and if he did not then pay or give security, or sell himself by entering into the *nexum,* his creditor had a right to seize him, load him with chains of a certain weight, and treat him as a slave, on a prescribed scanty allowance; and if he failed to pay after being sixty days in prison, he was to be brought before the people on three market days, and the debt proclaimed; if no friend appeared, he was either to be put to death or sold as a slave into Etruria; and if there were several creditors, he might at their election be sold beyond the Tiber, or his body cut into pieces. Gibbon (Hist. vol. viii. p. 92) takes this law in the literal sense, and so does Gravina, de Jure Nat. Gent. et XII. Tab.

police, and very considerably advanced in civilization. They contain a great deal of wisdom and good sense, intermixed with folly,

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sec. 72; and he adopts the argument of Sextus Cæcilius, in A. Gell. Noct. Att. 20, 1, who maintained that the law was only cruel in appearance, and that he had never read or heard of its being executed, for its extreme severity prevented the creation of debt. Montesquieu well observes, that, upon such reasoning, the most cruel laws would be best; and he thinks the better construction to be, that the law only related to the division of the debtor's property Esprit des Lois, b. 29, c. 2; Bynkershoek, Observ. Jur. Rom. lib. i. c. 1, and Heineccius, Antiq. Rom. lib. iii. tit. 30, sec. 4, are of the same opinion. Pothier, in his introduction to his Pandectæ Justinianeæ, has inserted the fragments of the twelve tables, as they were restored by Gothofredus, and he has illustrated them by brief notes and commentaries. He is for a literal construction of this part of the twelve tables, and he says this was the construction of all the writers of antiquity who make mention of them, such as Quintilian, Tertullian, and A. Gellius. Professor Hugo is also obliged to renounce the metaphorical, and follow, with the ancients, the literal interpretation of the twelve tables on this subject. Histoire du Droit Romain, par G. Hugo, traduite de l'Allemand par Jourdan, tom. i. p. 233, sec. 149. Niebuhr, in his History of Rome, vol. ii. p. 597, takes the law literally, and says that no sound-headed person ought to construe it otherwise. He says its severity was designed to compel the debtor to redeem himself, or enter into a *nexum*, by which he became liable to pay interest, and to work out his debt by labor. Gravina, De Jure Nat. Gent. sec. 21, says, there are grounds to conclude that the *legis regiæ*, with the exception of such as relate to regal domination, were incorporated into the first three of these twelve tables.

The 4th table related to *the rights of fathers and families*. It gave to fathers the power of life and death and of sale over their children, and the right to kill immediately a child born deformed. On the other hand, and as some compensation for these atrocious provisions, it declared, that if a father neglected to teach his son a trade, he was not obliged to maintain his father when in want; nor was an illegitimate child bound to maintain his father.

The 5th table related to *inheritances and guardianships*. It declared, that if the father died intestate, (for he had a right to dispose of his property by will,) and had no children, his nearest relations were to be his heirs; and if he had no relations, a man of his own name was to be his heir. He had the right to appoint guardians to his children. If a freedman died intestate and without heirs, his effects went to the family of his patron. The heirs were to pay the debts of the ancestor in proportion to their share of his estate. It also provided, in the case of lunatics and prodigals, that the relations, and if none, that one of the name, was to have the care of the person and estate. If he left children, the sons and daughters inherited equally; but though daughters inherited on an equal footing with the sons, yet they became wards to their brothers; and all women were, at all times of their lives, and under all circumstances, under guardianship and civil disabilities. (Dr. Arnold, in his History of Rome, vol. i. 257 – 295, has examined the state of the Roman law, as left by the decemvirs, with great research and ability.)

The 6th table related to *property and possession*. It declared that the title of goods should not pass on sale and delivery, without payment. Two years' possession amounted to a right of prescription for lands belonging to private individuals, provided the possession was not obtained by force or fraud, and one year for movables. It likewise declared, that in litigated cases, the presumption should always be on the

injustice, and cruelty. They were engrossed on tablets of wood, or brass, or ivory, (*g*) and were exposed to destruction, though un-

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side of the possessor; and that in disputes about liberty and slavery, the presumption should always be on the side of liberty. All sales of land or movables were by delivery (*mancipatio*) verbally, in the presence of witnesses.

The 7th table related to *trespasses and damages*. It provided that compensation be made for trespasses; and that for arson or maliciously setting fire to a house, or to grain near to it, the offender was to be scourged and burnt to death. The *lex talionis* was applied to losses of limb, unless the injured party accepted some other satisfaction. A pecuniary fine of three hundred pounds of brass was declared for dislocating a bone, and twenty-five asses of brass for a common blow with the fist. (It is related in the Noc. Att. 20, 1, that one Lucius Neratius, in after times, when the city became wealthy, and such a fine insignificant, amused himself with striking freedmen in the face as he met them in the street, and then ordering his servant, who followed him for the purpose with a bag of brass money, to count out and tender the twenty-five pieces, as the compensation fixed by law.) It was provided, also, by this table, that slanderers, by words or verses, should be beaten with a club. False witnesses were to be thrown headlong from the capitol, and parricides were to be sewed up in a sack and thrown into the Tiber. Whoever wilfully killed, or poisoned, or prepared poison for a freedman, or used magical words to hurt him, was punishable as a homicide. Guardians and patrons who acted fraudulently in their trust, were to be fined and held odious.

The 8th table related to *estates in the country*. It required a space of two and a half feet to be left between every house; and it allowed societies or private companies to make their own by-laws, not being inconsistent with the public law. The prætor was to assign arbitrators in cases of disputes about boundaries; and it provided redress for nuisances to fields by the shade of trees, or by watercourses. It required roads to be eight feet wide, and double at corners. It allowed travellers to drive over the adjoining land, if the road was bad.

The 9th table was concerning *the common rights of the people*. It prohibited all special privileges to any person, and it restored debtors, who had been redeemed from slavery, to their former rights. It made bribery, in a judge or arbitrator, or the holding or attending seditious assemblies in the city by night, or delivering up a Roman citizen to a foreigner, or soliciting a foreigner to declare himself against Rome, capital offences. It declared that all causes relating to the life, liberty, or rights of a Roman citizen should be tried in the *comitia centuriata*. The people were to choose quæstors to take cognizance of capital cases. (The *burghers* of the city of Rome, in the early period of the commonwealth, engrossed the wealth and the foreign commerce, and were the patricians and money-lenders, while the *free commoners*, who were agriculturists on small farms in the country, adjoining the city, were forbidden to engage in commerce, and were the money-borrowers, and suffered greatly from hostile incursions, and were poor and oppressed. Arnold's History of Rome, vol. i. 135.)

The 10th table related to *funerals*. It prohibited the dead to be interred or burnt within the city, or within sixty feet of any house. It prohibited all excessive wailings at funerals, and women from tearing their faces or making hideous outcries on

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(*g*) Heineccii Hist. Juris Civilis, lib. 1, sec. 26. Niebuhr says they were graven on ten tables of brass, and posted up in the Comitium.

questionably preserved, when the city was burned by the Gauls. (*h*) They existed entire in the third, but did not, as Heineccius supposes, survive the sixth century of the Christian era. This code obtained, in the subsequent ages of the republic, from the
* 526 most distinguished * philosophers, historians, and statesmen,

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such occasions. It regulated and limited the expense of funeral piles, and all costliness at funerals, such as the dress of the deceased, the players upon the flute, the perfumed liquors, the gold thread, the crown, festoons, &c.

The 11th table made part of the *jus sacrum*, or pontificial law. All the other tables related to civil rights, but this related to *religion and the worship of the gods*. It required all persons to come with purity and piety to the assemblies of religion; and no person was to worship any new or foreign gods in private, unless authorized by public authority. Every one was to observe his family festivals, and the rights used in his own family, and by his ancestors, in the worship of his domestic deities. Honor was to be paid to those heroes and sages whom their merit had raised to heaven. The commendable virtues were to be ranked among the gods, and to have temples erected to them, but no worship was to be paid to any vice. The sacrifices to the gods by the priests were to be the fruits of the earth and young animals, and with the most authorized ceremonies. No one was to be initiated in any mysteries but those of Ceres. Stealing of what was devoted to the gods, and incest, were declared to be capital crimes.

The 12th table related to *marriage and the rights of husbands*. It prescribed freedom of divorce at the pleasure of the husband; and it allowed the husband, with the consent of his wife's relations, to put her to death, when taken in adultery or drunkenness; and it declared it to be unlawful for patricians to intermarry with plebeians.

Mr. Prescott, in his learned and excellent History of the Conquest of Mexico, has given a short but interesting view of the judicial system, and of the code of laws in the Aztec or Mexican monarchy, prior to the overthrow of it by Fernando Cortés. He says that the Aztec code, though stamped with the ferocity of a rude people, evinced a profound respect for the great principles of morality. Their military usages had a remarkable resemblance to those of the early Romans, and their political institutions denoted a degree of civilization not much short of that enjoyed by the Anglo-Saxons under Alfred. I should think that their legal code might bear a favorable comparison with much that is to be found in the celebrated twelve tables of the Roman law. The superior judges were wholly independent of the monarch, and held their offices for life, and were maintained from the produce of the crown lands. Punishments were, generally, like the laws of Draco, capital; but their application to crimes showed a solicitude for the rights of property and good order. Murder, even of a slave, was punished with death; so was the conviction of adultery, removing the boundaries of another's land, altering the established measure, abuses of guardians' trust, drunkenness, prodigal waste of patrimony, and theft. Hospitals were established in the principal cities for the cure of the sick, and the permanent refuge of the disabled soldier. Public defaulters were liable to be sold as slaves. The marriage institution was protected and respected. Prescott's Hist. vol. i. pp. 29–38, 44, 49.

(*h*) Livy, b. 6, c. 1, says, Quæ in commentariis pontificum, aliisque publicis privatisque erant monumentis, incensa urbe, *pleraque interiere*. N. Hook's Diss. on the credibility of the first five centuries of Rome. Cicero speaks of them as being in his time on tables of brass, and as having been injured by lightning, — *legum æra liquefacta*. Orat. in Cat. 3, 4.

the blind tribute of patriotic veneration, and the most extravagant eulogy, as being a system inculcating the soundest principles of ethics and civil polity, and surpassing in value the jurisprudence of Solon and Lycurgus, the twelve books of the laws of Plato, and whole libraries of Grecian philosophy. (*a*) As Rome increased in territory, wealth, arts, and refinement, her laws were progressively enlarged and improved, and adapted to the progress of society, and its increasing wants and vices. The obligation of the twelve tables was gradually diminished or destroyed by the multitude of new regulations, and the history of the Roman law, from the time of the twelve tables to the reign of Hadrian, is eminently instructive.

*527 *After many struggles, the patricians were obliged, by the *lex Hortensia*, to submit to the authority of the *plebiscita*, enacted by the plebeians alone in their *comitia tributa*, as being of equal force with the *leges*, passed at the instance of a consular or senatorial magistrate, by the whole aggregate body of the people, patricians and plebeians. (*a*) The senate also frequently promulgated laws under the name of *senatus consulta*, by their own authority. (*b*) A *senatus consultum* was allowed to continue in force only one year, unless ratified by the common course of *rogatio ad populum;* and the tribunes could, at any time, by their *veto*, put a negative upon any projected decree of the senate. That body likewise assumed the right to dispense with laws, though, by a law proposed by the tribune Caius Cornelius, the senate could not exercise their dispensing power, unless two hundred senators were present. By the Publilian law, passed in the year of the city 416, the comitia of the *curiæ* were deprived of their veto or power as a

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(*a*) Cic. de Orat. b. 1, c. 43, 44; De Leg. 2, sec. 23; Livy's Hist. 3, 34; Tacit. Ann. 3, 27; A Gell. Noct. Att. 20, 1. In the newly discovered treatise of Cicero, De Republica, lib. ii. c. 36, 37, he insists, that the ten first tables were composed with the greatest equity and prudence, but he declares that the two last tables, added by the decemvirs, were iniquitous laws, and that the law prohibiting marriages between plebeians and senatorial families was a most infamous law.

(*a*) The Hortensian law abolished the senate's veto upon *plebiscita*, after the Publilian law had done away with the authority of the *curiæ* respecting them; and Niebuhr considers the Hortensian law as the commencement of the destruction of the constitution. Niebuhr's Hist. vol. iii. 419–421.

(*b*) Inst. 1, 2, 4; Dig. 1, 2, 9. The proofs are abundant, that even before the Augustan age, the *senatus consulta* had become one of the regular sources of the Roman law. Cicero, De Legibus, b. 3; Histoire du Droit Rom. par G. Hugo, sec. 174, 175, 176. *Qui consulta Patrum, qui leges juraque servat.* Hor. Epist. 1, 16, v. 41.

branch of the legislature in passing upon laws enacted by the comitia of tribes, and their consent was no longer requisite to laws submitted by the senate to the comitia of the centuries. But the senate, which now consisted of the most eminent men, and was a mixed body of both patricians and commoners, continued to be the great national council. (*c*) Within a very few years after the adoption of the twelve tables, the prohibition of marriages between the patricians and plebeians was abolished; but the patricians had the address to retain the management and control of the whole administration of justice. This was effected in several ways. It was effected by the institution of legal forms of judicial proceeding, called *legis actiones*, and by means of the *pontifices*, who regulated the calendar, and were the repositories of the laws and annals, and assumed the power of fixing the lawful days of business, and *dies fasti et nefasti*. These judicial forms and solemnities gave order and uniformity to the administration of justice; but they were mysteries of jurisprudence, confined to the learned of the patrician order, and locked up in the pontifical archives. They could not be changed at the pleasure of the people, and the right to interpret them belonged to the pontifical college, and the patricians had retained the exclusive right of being eligible to the offices of the priesthood. (*a*) The forms remained confused and undigested until Appius Claudius Cœcus, a member of the pontifical fraternity, reduced them into one collection, which his scribe, Cnæus Flavius, surreptitiously published, together with the calendar, or *fasti*, to the great satisfaction of the people. (*b*) It acquired the title of

Legal forms.

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(*c*) Arnold's Hist. of Rome, vol. ii. 155, 158. It was the province of the *censors* to revise the list of senators and add to the roll, as well as to revise the rolls of the several tribes. The censorship was an office of the highest rank and power, with a command of the public moneys, and with the power of commencing and conducting public works, such as roads and aqueducts. Id. 282–287; Cicero, De Legibus, b. 3. With respect to the senate, the Hortensian law, prior to the year of Rome 474, deprived the senate of its veto, and declared the people assembled in their tribes to be a supreme legislative power. The tribes in the forum and the senate were placed on a footing of equality; neither had a veto on the enactments of the other, and the tribunes had a veto upon both alike. The enactments of both were considered as equal to laws. The senate, in its original form, was only a select assembly of the *patres*, whose great assembly was the *comitia curiata*. Id. 383–385.

(*a*) Dig. b. 1, tit. 2; De Orig. Jur. sec. 6. Gravina says, De Ortu et Prog. J. C. sec. 33, that they were established by the policy of the ancient lawyers.

(*b*) Cic. pro. Muræna, sec. 11; De Orat. 1, 41.

the Jus civile Flavianum; and a second collection of these legal precedents afterwards appeared, and was called the Jus civile Ælianum. (*c*) This Roman science of special pleading became a subject of ridicule by Cicero, as being a cunning and captious verbal science; and these forms were expressly abolished by the Emperor Constantine as insidious. (*d*)

Prætorian law.

The edicts of the prætor became another very important means of the increase and improvement of the Roman law. By the Licinian law, passed in the year of Rome 384, the office of consul was no longer confined to the patrician order, and a plebeian consul was elected in the centuries, and confirmed by the *curiæ*. But as a compensation for this loss of patrician power, the judicial was separated from the consular office, and a prætor was instituted, who was always to be a patrician. (*e*) The judicial decisions of the prætors, or *edicta prætorum*, became of great consequence. They were called *jus honorarium*, or patrician law, derived from the honor of the prætor. (*f*) There had been, from the foundation of the city, a magistrate called *præfectus urbis*, to administer justice in the absence of the king or consul; and after the plebeians obtained a share in the consular dignity, the patricians created a permanent city prætor, and they confined his province to the administration of justice; and such a magistrate was indispensable, as the consuls were engaged in foreign and executive duties. (*g*) The prætor was at first a patrician, and *elected in the *comitia centuriata*, though *529 the office in time became accessible to plebeians. Business soon required a second prætor to preside over the causes of foreigners, called *prætor peregrinus*, (*a*) and prætors were afterwards

(*c*) Dig. 1, 2, 7; Livy's Hist. 9, 46; Gravina, de Ortu Jur. Civ. sec. 33, and De Jur Nat. et XII. Tab. sec. 79, 80.

(*d*) *Leguleius quidam cautus et actutus præco actionum, cantor fabularum, auceps syllabarum.* Cic. de Orat. 1, 55. See, also, Cod. 2, 58. *De formulis et impetrationibus actionum sublatis.*

(*e*) Dr. Arnold gives an interesting history of the struggles which produced this great innovation in the Roman constitution. History of Rome, vol. ii. 33–61. The institution of the office of prætor was in A. U. C. 387.

(*f*) Dig. 1, 1, 7, and 1, 2, 10.

(*g*) Dig. 1, 2, sec. 26, 28.

(*a*) Professor Hugo, in his History of the Roman Law, sec. 158, attributes to the institution of the *prætor peregrinus* the rise and growth of the *jus gentium*, which had a propitious influence even upon the Roman municipal jurisprudence. The civilians used the *jus gentium* as synonymous with reason and natural law, and in contradis-

allotted to the provinces as the empire widened. Under Augustus the prætors had multiplied to sixteen; and in the time of Pomponius there were eighteen, and one of them judged *de fideicommisso*. (*b*) Every prætor, on entering into office, established and published certain rules and forms, as the principle and method by which he proposed to administer justice for the year. He had no power to alter these rules, and this *jus prætorium vel honorarium* tempered the ancient law by the spirit of equity and public utility, and it was termed the living interpreter of the civil law. (*c*) The edicts of the prætor were generally declaratory of the customary or unwritten law and practice of his predecessors. But as the prætor was apt to vary from his annual edict, and to change it according to circumstances, which opened the way to many frauds, it was provided, by a law enacted at the instance of the tribune Caius Cornelius, that the prætor should adhere to his edicts promulgated on the commencement of his magistracy. These prætorian edicts were studied as the most interesting branch of Roman law, and they became a substitute for the knowledge of the twelve tables, which fell into neglect, though they had once been taught as a *carmen necessarium*, and regarded as the source of all legal discipline. (*d*)

* 530 * The opinions of lawyers, called the *responsa*, or *interpretationes prudentum*, composed another and very efficient source of the ancient Roman jurisprudence.

Responsa prudentum.

The most ancient interpreters were the members of the college of *pontifices*, composed of men of the first rank and knowledge. Civil statesmen and eminent private citizens followed their example, and sometimes debated in the forum. Their answers to questions put were gradually adopted by the courts of justice, by reason of their intrinsic equity and good sense; and they became

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tinction to the *jus civile*, which was considered as local, peculiar, and exclusive to one particular people. It was their municipal law; the other was international. To the authority of the *jus prætorium* the edicts of the *prætor urbanus* and the *prætor peregrinus* seem to have equally contributed. Ibid. sec. 188, 189.

(*b*) Dig. 1, 2, 32.

(*c*) Dig. 1, 1, 7, 8.

(*d*) Cic. de Leg. b. 1, c. 5, and b. 2, c. 23; Cic. de Orat. b. 1, c. 10; Gravina, de Ortu et Prog. J. C. sec. 38. The Edicta Magistratuum or Jus Prætorium, was not only a fruitful, but a legitimate source of the Roman law, as Hugo has labored to prove. Hist. du Droit Rom. sec. 177, 178, 179. He compares this prætorian law to the English equity jurisprudence. Many of the edicts bore a resemblance to the modern ordinances, or Codes de Procedure Civile.

incorporated into the body of the Roman common law under the name of *fori disputationes*, and *jus civile*, or *responsa prudentum*. (*a*) This business, undertaken gratuitously by persons of the highest distinction, grew into a public profession, and law became a regular science, taught openly in private houses as in schools. The names of the principal lawyers who became, in this way, public professors of the law are to be found in the work of Pomponius, (*b*) and in the writings of Cicero, Horace, Tacitus, and the other authors of the classical ages. Their opinions were preserved by their successors, and fragments of them are, no doubt, dispersed in different parts of the Pandects, without the sanction of their names. (*c*) Cicero speaks of * this em- * 531 ployment of distinguished jurists with the greatest encomiums, and as being the grace and ornament, and most honorable business of old age. The house of such a civilian becomes a living oracle to the whole city; and this very accomplished orator and statesman fondly anticipated such a dignified retreat and occupation for his declining years. (*a*) The philosophy and policy and wisdom of Greece were collected together, says Gravina, (*b*) by the Roman civilians, and all that was useful introduced into the Roman law; and if it were really true that the twelve tables were not drawn by the rough agents who compiled them directly from Grecian fountains, we are assured that the omission was abundantly supplied in after ages; and the institutions of Greece were studied by more enlightened statesmen, and contributed to perfect and adorn the Roman law. (*c*)

(*a*) Dig. 1, 2, 5.

(*b*) Dig. 1, 2.

(*c*) In the times of the republic, the practice of the law was gratuitous and highly honorary. All employment for hire was prohibited by a law enacted in the year of the city 550, at the instance of the tribune Marcus Cincius. The profession at length became a business of gain, and was abused, until Augustus revived the Cincian law, with additional sanction by a decree of the senate. But as a reasonable compensation was necessary to advocates who devoted their time and talents to the profession, the compensation was allowed and regulated by a decree of the senate in the time of Claudius (Tacit. Ann. b. 11, c. 5, 6, 7); and afterwards, according to the law of the Pandects, b. 50, tit. 13, c. 1, sec. 5, 10, 12, the judges in the province were to determine on, and allow a reasonable charge to the advocate.

(*a*) Cic. de Orat. 1, 45; De Legibus, b. 1. See, also, Quintilian's Inst. lib. 12, c. 11, where he alludes to Cicero, and strongly approves of this employment of the orator when he retires from practice at the bar.

(*b*) Orig. Jur. Civ. b. 1. Proæm.

(*c*) The Grecian philosophy was not more fatal to the ancient Roman superstition

In the Augustan age, the body of the Roman law had
*532 *grown to immense magnitude. (*a*) It was composed of
Age of Augustus. the *leges*, or will of the whole Roman people declared in the *comitia centuriata;* the *plebiscita*, enacted in the *comitia tributa;* the *senatus consulta*, promulgated by the single authority of the senate; the *legis actiones;* the *edicta magistratuum;* the *responsa prudentum;* and, subsequent to the age of Cicero, is to be added the *constitutio principis*, or ordinances of the Roman emperors. (*b*) The Roman civilians began very early to make collections and digests of the law. The book of Sextus Ælius contained the laws of the twelve tables, the forms of actions, and the *responsa prudentum*. Publius Mucius, Quintus Mucius, Brutus, and Manilius, all left volumes upon law, and the three books of the latter existed in the time of Pomponius as monuments of his fame. (*c*) Servius Sulpicius left behind him nearly one hundred and eighty volumes upon the civil law. Many distinguished scholars arose under his discipline, who wrote upon jurisprudence; and Aufidius Namusa digested the writings of ten of those scholars into one hundred and forty books. Antistius Labeo, under Augustus, surpassed all his contemporaries, and he compiled four hundred volumes, many of which, Pomponius says, he possessed. (*d*) The noble design of reducing the civil law into a convenient digest was conceived by such great men as Cicero, (*e*)

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than Grecian forensic eloquence was to the severity of the Roman civil law. Hugo's Histoire du Droit Romain, sec. 161. Cicero was of opinion that his countrymen excelled the Greeks in laws and institutions, as well as morals and manners. *Mores et instituta vitæ, resque domesticas ac familiares nos profecto et melius tuemur et lautius; rem vero publicam nostri majores certe melioribus temperaverunt et institutis et legibus.* Tuscal. Quæst. lib. 1, c. 1. He supposes that the early Romans had imbibed a tincture of the philosophy of the Greeks from the doctrines of Pythagoras, who dwelt in southern Italy at the time of the expulsion of the Tarquins. Ibid. lib. 4, 1. But it was Cicero himself, who, by his writings, transferred into his own vernacular tongue the great body of the Grecian philosophy.

(*a*) *Immensus aliarum super alias acervatarum legum cumulus.* Livy 3, 34. Heineccius applied this passage of Livy to the civil law, but Hugo says he was in an error, and that the most part of the laws referred to by Livy were political regulations, and had no concern with private right. Hist. du Droit Rom. par Hugo, sec. 167.

(*b*) Dig. 1, 1, 7, and 1, 2, 12; Inst. 1, 2, 3; Gaius, 1, 2.

(*c*) Dig. 1. 2, 36, and 39.

(*d*) Dig. 1, 2, sec. 41, 43, 44, 46, 47.

(*e*) Cicero says he had long thought of the task of digesting and reducing the civil law into a few elementary and definite principles, and thereby relieving it from difficulty and obscurity. De Orat. lib. 1, c. 42.

Pompey, and Julius Cæsar; (*f*) though it is certain that no systematic, accessible, and authoritative treatise on the civil law appeared during * the existence of the republic; and *533 Cicero says that the law lay scattered and dissipated in his time. (*a*) The Roman jurisprudence was destined to continue for several centuries under the imperial government, a shapeless and enormous mass, receiving continual accumulations; but it was fortunately cultivated under the emperors by a succession of illustrious men, equally distinguished for their learning, wisdom, and probity.

Before the time of Augustus, the *responsa prudentum* were given *viva voce*, and they had not the force of any authority in the forum, and the business was free to all persons. The character of these *responsa* was abused and discredited by the crude opinions of pretenders, and Augustus restrained the profession of the jurisconsults to such as he should select as most worthy, and they were to be first approved of and commissioned by him. They then began to give their opinions in writing, with their reasons annexed. (*b*) This raised their influence, and reduced the prætors to a state of comparative dependence upon those living oracles of law, who were under the influence of the emperor, and who obtained, by their means, the control of the administration of the law. (*c*) Heineccius says that Augustus instituted this college of civilians in order that he might covertly assume legislative power, and adapt the republican jurisprudence to the change in the government. He likewise instituted a cabinet council, which was called the *consistory*, by succeeding princes. It was composed of the consuls, several other magistrates and jurists, and a certain number of senators chosen by lot. (*d*) Ulpian was a member of this royal council under Alexander * Severus. It *534 was the imperial legislature. The power of the *comitia* was transferred to this shadow of a Roman senate, for the old con-

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(*f*) Suet. J. Cæsar, sec. 44.

(*a*) Cic. de Orat. lib. 2, c. 33; Heineccii, Elementa Juris. Inst. Proæm. sec. 2; Dr. Taylor's Elements of the Civil Law, p. 14.

(*b*) Dig. 1, 2, 47; Heinec. Hist. Jur. Civ. lib. 1, sec. 157, 158, 180.

(*c*) Gravina, de Ortu et Prog. sec. 42, 43; Heinecc. Antiq. Rom. lib. 1, tit. 2, sec. 39.

(*d*) Gravina, de Romano Imperio, sec. 17. This imperial consistory was imitated by the provincial governors. History of the Roman Law during the Middle Ages, by Savigny, vol. i. p. 87.

stitutional senate, not being able conveniently to govern all the provinces, (according to the courtly language of the Pandects,) (*a*) gave to the prince the right to make laws. The judgments of the prince were called imperial constitutions, and they were usually enacted and promulgated in three ways: 1st. By rescript, or letter in answer to petitions, or to a distant magistrate. (*b*) 2d. By decrees passed by the emperor on a public hearing in a court of justice; and Paulus collected six books of those decrees, and from which he for the most part dissented. (*c*) 3d. By edict, or mere voluntary ordinances. Gravina says that these imperial constitutions proceeded not as from a single individual, but as from the oracle of the republic, by the voice of the senators, who were consulted, and were the visible representatives of the majesty of the commonwealth. (*d*) Many of these imperial ordinances were suggested by the best of the civilians, and do great honor to their authors; and with regard to private and personal rights, the Romans enjoyed, to a very great degree, under the emperors, the benefit of their primitive fundamental laws, as they existed in the times of the republic. The profession of the law was held in high estimation under the emperors; and during the second and third centuries, the science of jurisprudence was elevated higher than it ever has been in any other age, or among any other people. Hadrian took off the restriction of Augustus, and
* 535 gave the privilege of being * a public interpreter of the law to the profession at large. (*a*) It was restored by the Emperor Severus, and the *responsa prudentum* assumed an air of great importance. Though in the first instance they were received as mere opinions, they gradually assumed the weight of authority. The opinions were sent in writing to the judges, and in the time of Justinian they were bound to determine according to those opinions. (*b*) These *responsa* (of which many are preserved in the Pandects) were not of the same authority as the constitutional *leges*, but they were law for the case, and they were applied to fu-

(*a*) Dig. 1, 2, sec. 11.

(*b*) Code 1, 14, 3; Gravina, de Ortu et Prog. sec. 123, 124.

(*c*) Gravina, Ibid. sec. 122; De Romano Imperio, sec. 20.

(*d*) Gravina, de Romano Imperio, Ibid. The imperial *rescripta* thus assumed the character and weight of judicial precedents, and were entitled to at least equal authority with the *responsa prudentum*.

(*a*) Dig. 1, 2, 2, 47.

(*b*) Inst. 1, 2, 8.

ture cases under the character of principles of equity, and not of precepts of law. In the ages immediately preceding Justinian, the civil law was in a deplorable condition, by reason of its magnitude and disorder; and scarcely any genius, says Heineccius, was bold enough to commit himself to such a labyrinth. As a remedy for the evil, the Emperor Theodosius the younger and Valentinian III. addressed to the senate of the city of Rome an imperial constitution, which confirmed, by decree, the writings of Papinian, Paulus, Gaius, Ulpian, and Modestinus, by name, and directed that they alone be permitted to be cited in the courts of justice, with the exception of such extracts as they had transferred into their books from the ancient lawyers, and with some other qualified exceptions in favor of Scævola, Sabinus, Julianus, and Marcellus. The opinion of the majority of these five legislative characters was to govern; and where there was in any case an equal division of opinion, that of Papinian was to be preferred. (*c*)

* The first authoritative digest of the Roman law which *536
actually appeared was the Perpetual Edict, compiled by
Salvius Julianus, under the orders of the Emperor Ha- Digests of the civil law.
drian, and of which nothing now remains but some fragments collected and arranged by Gothofrede, and published along with the body of the civil law. Hadrian was the first emperor who dispensed with the ceremony of the *senatus consulta*, and promulgated his decrees upon his sole authority. (*a*) The prætorian edicts had been so controlled under the government of the emperors by the opinions of the civilians, that they lost the greater part of their ancient dignity, and Hadrian projected the design of reducing the whole Roman law into one regular system. All that he however lived to perform, was to procure the compilation of those edicts of the prætors which had stood the test of experience

(*c*) Heinec. Antiq. Rom. Jur. lib. 1, tit. 2, sec. 41; Histor. Jur. Civ. lib. 1, sec. 378. Heineccius says, that Papinian was everywhere called *Juris asylum et Doctrinæ legalis thesaurus*, and he far surpassed all his brethren, *omnes longo post se intervallo reliquerit.* Gaius (Inst. lib. 1, sec. 2) refers to a rescript of the Emperor Hadrian, in which the *responsa prudentum* were to be received as law, if they were unanimous, and if not, the judge was at liberty to follow his own judgment. At the period of Valentinian, the writings of the great jurists and the constitutions of the emperors were alone consulted as authorities. Savigny's History of the Roman Law, vol. i. p. 7.

(*a*) Gibbon's History, vol. viii. p. 16. The *plebiscita* had ceased under Augustus, but the *senatus consulta* did not absolutely cease with Hadrian. They continued to enrich the civil law in matters of private right long afterwards. Hugo, Hist. du Droit Rom. sec. 284, 307.

on account of their authority and equity, and had received the illustrations of civilians. (*b*) Many able professors undertook, from time to time, a digest of the civil law. Papirius Justus collected some of the imperial constitutions into twenty books, and Julius Paulus compiled six books of decrees, or imperial decisions. Gregorius made a collection of a higher character, and he digested into order the chief, if not the whole of the imperial rescripts, from Hadrian down to the reign of Diocletian and his colleagues, and which was called the Gregorian Code, and attained great authority in the forum. Hermogenes continued this collection under the name of the Hermogenian Code. (*c*) Theodosius the
*537 younger * appointed a committee of eight civilians to reduce the imperial constitutions, or the edicts and rescripts of a succession of emperors, from the time of Constantine, into a methodical compendium; and this Theodosian Code became a standard work throughout the empire, and it was published in six folio volumes in 1665, with a vast and most learned commentary by Gothofrede. (*a*) Another century elapsed before Justinian directed Tribonian, who was an eminent lawyer and magistrate, to unite with him a number of skilful civilians, and to assume the great task of collecting the entire body of the civil law, which had been accumulating for fourteen centuries, into one systematic code. Whether the Roman law at that period exceeded or fell short of the number of volumes in which the English law is now embodied it is not easy to determine. Tribonia represented to the emperor, that, when he and his learned associates undertook the business of digesting the civil law, he found it dispersed in two thousand books, and in upwards of three millions of verses, (*b*) detached from the writings of the sages, which it was necessary to read and understand in order to make the selections. The size of these volumes, and the exact quantity of matter in these verses,

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(*b*) Gravina, de Ortu et Prog. Jur. Civ. sec. 38.

(*c*) Heinec. Hist. Jur. Civ. lib. 1, sec. 368 – 372.

(*a*) The great merit of this edition of the Theodosian Code, and the fitness of Gothofredus for the task, by his extraordinary industry, erudition, and judgment, are forcibly stated by Dr. Irving, in his Introduction to the Study of the Civil Law, 4th edit., London, 1837, — a work well worthy of the attention of the student in the civil law, for its historical and biographical learning, and the critical sagacity of the author.

(*b*) *Duo pene millia librorum esse conscripta, et plus quam trecentiens decem millia versuum a veteribus effusa.* Secund. Præf. ad Dig. sec. 1.

we cannot ascertain. (*c*) It is, however, a fact beyond all doubt, that the state of the Roman law rendered a revision indispensable. Justinian himself assures us (*d*) that it lay in such great confusion, and was of such infinite extent, as to be beyond the power of any human capacity to digest.

* The compilations made under Justinian, and which con- *538
stitute the existing body of the civil law, consist of the following works, and which I shall mention in the order in which they were originally published. Corpus Juris Civilis.

(1.) The Code, in twelve books, is a collection of all the imperial statutes that were thought worth preserving, from Hadrian to Justinian. In the revision of them, the direction to Tribonian, and his nine learned associates, was, that they should extract a series of plain and concise laws, omitting the preambles, and all other superfluous matter; and they were likewise intrusted with the great and hazardous power to extend, or limit, or alter the sense, in such a manner as they should think most likely to facilitate their future use and operation. (*a*) Code.

(2.) The Institutes, or Elements of the Roman Law, in four books, were collected by Tribonian and two associates. They contain the fundamental principles of the ancient law in a small body, for the use and benefit of students at law. This work was particularly adapted to the use of the law schools at Berytus, Rome, and Constantinople, which flourished in that age, and shed great lustre on the Roman jurisprudence. (*b*) It is such an admirable compendium of the elements of the civil law, that it has in modern times passed through numerous editions, and received the most copious and laborious illustrations. It has been a model, by reason of its scientific and orderly arrangement, for every modern digest of municipal law. The Institutes were compiled chiefly from the writings of Gaius; and a discovery by M. Niebuhr, so late as 1816, of a rewritten manuscript of the entire Institutes.

(*c*) Professor Hugo, in his History of the Roman Law, sec. 318, reduces by computation the Roman laws to 580 volumes, of a moderate size. He allows 24 of the three millions of verses to a page, and 400 pages to a volume. The 2,000 books, judging from the books in the Pandects, will give only 280 volumes. This reasonable estimate takes away every appearance of the marvellous from the magnitude of the Roman law.

(*d*) Prima Præf. ad Dig. sec. 1.

(*a*) Pref. Prima ad Cod. sec. 2.

(*b*) Justinian had forbidden all schools of law but the three mentioned in the text.

Institutions of Gaius has given increased interest to the Institutes of Justinian. (*c*)

*539 * (3.) The Digest, or Pandects, is a vast abridgment, in fifty books, of the decisions of prætors, and the writings and opinions of the ancient sages of the law. This is the work which has principally excited the study and reflections and commentaries of succeeding ages. It is supposed to contain the embodied wisdom of the Roman people in civil jurisprudence for near 1200 years; and the European world has ever since had recourse to it for authority and direction upon public law, and for the exposition of the principles of natural justice. The most authentic and interesting information concerning the compilation of the Pandects is to be found in the ordinances of Justinian, prefixed by way of prefaces, to the work itself.

In the first ordinance addressed by Justinian to his quæstor Tribonian, he directs him and his associates to read and correct the books which had been written by authority upon the Roman law, and to extract from them a body of jurisprudence in which there should be no two laws contradictory or alike, and that the collection should be a substitute for all former works; that the compilation should be made in fifty books, and digested upon the plan of the perpetual edict, and contain all that is worth having in the Roman law for the preceding 1400 years, so that it might

*540 * hereafter be regarded as the temple and sanctuary of justice. He directed that the selection be made from the civilians, and the laws then in force, with such discretion and sagacity as to produce in the result a perfect and immortal work.

(*c*) See an account of that discovery in N. A. Review for April, 1821. The Institutes of Gaius are the prototype of Justinian's Institutes. They were discovered by Niebuhr, the historian, in 1816, in the Cathedral Library at Verona. The manuscript was a *codex rescriptus*, and in 62 out of 251 pages *iterum rescriptus*. The original text had, during the dark ages, been obliterated for other matter, which, in its turn, was supplanted by the Epistles of St. Jerome. The original work was restored to the world by the skill and perseverance of Professors Goschen, Bakker, and Hollweg, of Berlin, who, upon Niebuhr's report, went to Verona. The work appeared for the first time in 1820. It awakened renewed zeal, bordering on enthusiasm, in Germany, for the study of the civil law. It led to dissertations from every quarter; and M. Boulet, in the preface to his French translation of Gaius's Institutes, says that no work ever produced a more remarkable revolution in the study of the Roman law. Institutes de Gaius, par J. B. E. Boulet, Pref. Professor Hugo makes great use of the Institutes of Gaius, as shedding new and bright light on many branches of the civil law. See Histoire du Droit Romain, par G. Hugo, sec. 329, *et passim*.

And, in the anticipation of the result, he declared that no commentaries were to be made upon the digest, as it had been found that the contradictions of expositors had disturbed the whole body of the ancient law.

In about three years after the publication of this first ordinance, Justinian issued another upon the completion of the work. In the latter ordinance, addressed to the senate and people, he declared that he had reduced the jurisprudence of the empire within reasonable limits, and within the power of all persons to possess at a moderate price, and without the necessity of expending a fortune in acquiring useless volumes of law. He stated, that in the compilation of the Pandects, Tribonian and his associates had drawn from authors of such antiquity that their names were unknown to the learned of that age. If defects should be discovered, recourse must be had to the emperor; and he pointedly prohibited all persons to have any further recourse to the ancient laws, or to institute any comparisons between them and the new compilation. And to prevent the system from being disfigured and disordered by the glosses of interpreters, he declared that no citations were to be made from any other books than the Institutes, the Pandects, and the Code; and that no commentaries were to be made upon them, upon pain of being subjected to the charge of the *crimen falsi*, and to have the commentaries destroyed.

The Pandects are supposed to have been compiled with too much haste, and they were very defective in precision and methodical arrangement. The emperor allowed ten years, and Tribonian and his sixteen colleagues finished the work in three years. It is said that the Pandects were composed of the writings of forty civilians, the principal part of whom lived under the latter Cæsars; and the doctrines only, and not the names of the more ancient sages, were * preserved. (*a*) *541 If the work had been executed with the care and leisure

(*a*) Professor Hugo concludes that the compilers of the Pandects had never seen the original writings of Mucius Scævola, though they are referred to as if they had really been read and consulted. Hist. du Droit Rom. sec. 320. He is further of opinion that the merit of the order which is so visible in the civil law is to be attributed to Servius Sulpicius, the friend of Cicero. Ibid. sec. 322. In the preface to Pothier's Pandects, the number of jurisconsults whose writings were employed in the compilation of the Pandects, *or whose opinions are therein referred to,* amounts to ninety-two, and sketches of their lives are given.

that Justinian intended, it would have been an incomparable monument of human wisdom. There are, as it is, in the compilation, a great many contradictory doctrines and opinions on the same subject, and too much of that very uncertainty which Justinian was so solicitous to avoid. But with all its errors and imperfections, the Pandects are the greatest repository of sound legal principles, applied to the private rights and business of mankind, that has ever appeared in any age or nation. Justinian has given it the venerable appellation of the temple of human justice. The excellent doctrines and the enlightened equity which pervade the work, were derived from the ancient sages, who were generally men of distinguished patriotism, and sustained the most unblemished character, and had frequently been advanced to the highest offices in the administration of the government. The names of Gaius, Scævola, Papinian, Ulpian, Paulus, and Modestinus may be selected from a multitude of civilians, as models of exalted virtue, and of the most cultivated reason and philosophy, drawn from the precepts and examples of freer and better ages. It is owing to their writings that the civil law, for the purity and vigor of its style, almost rivals the productions of the Augustan age. (*b*)

* 542 Novels. * (4.) The Novels of Justinian are a collection of new imperial statutes, which constitute a part of the body of the civil law. These ordinances were passed subsequent to the date of the Code, and had been required in the course of a long reign and by the exigencies of succeeding times. They were made to supply the omissions and correct the errors of the preceding publications; and they are said, by competent judges, to show the declining taste of the age, and to want much of that brevity, dignity, perspicuity, and elegance which distinguished the juridical compositions of the ancients. Some of these novels are of great utility, and particularly the 118th novel, which is the groundwork of the English and American statutes of distribution of intestates' effects. (*a*) The Institutes, Code, and Pandects

(*b*) According to Hommel, a writer cited by Professor Hugo, of the 1800 pages of which the Pandects are composed, 600 were taken from the writings of Ulpian, 300 from Paulus, 100 from Papinian, 90 from Julian, 78 from Scævola, 72 from Pomponius, 70 from Gaius, 41 from Modestinus, and so on to other civilians of less note in diminished proportions.

(*a*) Sir William Blackstone, Com. vol. ii. p. 516, does not seem willing to admit

were afterwards translated into Greek, and the Novels were generally composed in that language, which had become the vernacular tongue of the eastern empire; and, as evidence of the universality of that tongue, Justinian declared that one of his constitutions was composed in the Greek language, for the benefit of all nations. (*b*)

When the body of the civil law, as contained in the Institutes, the Pandects, and the Code, was ratified and confirmed by Justinian, it became exclusively the law of the land; and the various texts from which the compilation was made fell speedily into oblivion; and all of them except the Theodosian code, and fragments of the other parts, disappeared * in the wreck of the empire. (*a*) The great work * 543 itself was in danger of being involved in the general destruction which attended the irruption of the northern barbarians into the southern provinces of Europe. The civil law maintained its ground a long time at Ravenna, and in the Illyrian borders; but all Italy passed at length under the laws, as well as under the yoke of the barbarians; — *belluinas atque ferinas immanesque Longobardorum leges accepit.* (*b*) There was but one circumstance that could give anything like compensation to the

Loss of the civil law.

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that the statute of distributions was taken from the civil law; but when Lord Holt and Sir Joseph Jekyll declare, (1 P. Wms. 27; Prec. in Chan. 593,) that the statute was penned by a civilian, and is to be governed and construed by the rules of the civil law, and when we compare the provisions in the English statute with the Roman novel, the conclusion seems to be very fair and very strong, that the one was borrowed essentially from the other.

(*b*) Inst. 3, 8, 3. The Latin language, in the time of Justinian, was the official language, but it was spoken only by a small portion of the inhabitants, and the language of the Church and of literature was Greek.

(*a*) Pothier, in his preface to his Pandectæ Justinianeæ, has given a rapid view of the Progress of the Roman jurisprudence, from the Jus Civile Papyrianum, under Tarquinius Priscus, to the time of Justinian, and an interesting sketch of the series of Roman lawyers, from the earliest notice of them far beyond the age of Cicero, down to the compilation of the Pandects. And notwithstanding the efforts of Justinian to supersede and destroy the admirable materials of the civil law, from which he was enabled to erect the splendid and ever-enduring monument of his reign, yet from the remains of the works of the civilians there has been compiled the Jus Civile ante-Justinianeum, which is a collection of great interest and currency on the continent of Europe. It has now received an addition of the utmost value in the newly discovered Institutions of Gaius.

(*b*) Gravina, de Ortu et Prog. Jur. Civ. sec. 139. The law school at Rome was transferred to Ravenna, where it existed even in the 11th century, and was then removed to Bologna.

inhabitants of Europe for the absence or silence of the civil law, during the violence and confusion of the feudal ages; but that circumstance was the redeeming spirit of civil and political liberty which pervaded the Gothic institutions, and tempered the fierceness of military governments, by the bold outlines and rough sketches of popular representation. (*c*) It was an indelible
* 544 and foul blot on * the character of the civil law, as digested under Justinian, that it expressly avowed and inculcated the doctrine of the absolute power of the emperor, and that all the right and power of the Roman people was transferred to him. (*a*) This had not till then been the language of the Roman laws; and Gravina, with much indignation, charges the introduction of the *lex regia* to the fraud and servility of Tribonian. (*b*) Be that as it may, the claim of despotism became afterwards a constitutional principle of imperial legislation. It has been made a question, whether the Pandects were for many ages so entirely lost to the western parts of Europe as has been generally supposed. (*c*) It is certain, however, that about

Revival of it.

(*c*) The German nations were associations of freemen prior to their invasion of the Roman empire, and their governments were mixed, or limited and elective monarchies, which continued to exist for a time, even after they had established themselves by conquest in the Roman provinces. All the Gothic governments in Europe, whether in Germany, Denmark, France, Spain, or England, were originally under the control of popular assemblies, or national councils of the aristocratic class, which gave their assent to laws, and were the basis of all lawful authority.

(*a*) Inst. 1, 2, 6; Prima Præf. ad Dig. sec. 7; Præf. secund. ad Dig. sec. 18, 21; Dig. 1, 4, 1; Code, 1, 14, 12; Dig. 32, 1, 23.

(*b*) De Romano Imperio, sec. 23, 24. Mr. Gibbon, in his History, vol. viii. 17, 18, seems to think that the *lex regia* was created by the fancy of Ulpian, or, more probably, of Tribonian himself. The *lex regia*, as mentioned in the Pandects, 1, tit. 4, *de constitutionibus principum*, lib. 1, and in the Institutes, 1, 2, 6, declares: — *quod principi placuit legis habet vigorem; utpote cum lege regia quæ de imperio ejus lata est, populus ei, et in eum omne suum imperium et potestatem conferat.* Selden, in his dissertation annexed to Fleta, c. 3, sec. 2, 3, 4, discusses the character of the *lex regia;* and he says it is evident that it stripped the people of all legislative power; and he places the origin of it back to the time of Augustus Cæsar, when the Roman people transferred all their power and authority to him. In the Institutes of Gaius, recently discovered, it is affirmed that the *lex regia* was not an interpolation by Tribonian, but was a law actually passed *nec unquam dubitatum est, quin id (constitutio principis) legis vicem obtineat, cum ipse imperator per legum imperium accipiat.* Gai. Instit. Com. lib. 1, sec. 5. But Hugo, in his Hist. du Droit Rom. sec. 277, considers the question on the origin of this law as still wrapped in impenetrable darkness.

(*c*) The university of Bologna had its professors of the civil law, and the Pandects were the subjects of legal studies there and elsewhere, prior to the era of the discovery of the Florentine copy of them at Amalphi, about the year 1135.

the time of the assumed discovery or exhibition of a
* complete copy of them at Amalphi, in Italy, near the *545
middle of the twelfth century, the study of the civil law revived throughout Italy and western Europe with surprising ardor and rapidity. The impression which the science of law, in so perfect a state of cultivation, made upon the progress of society, and the usages of the feudal jurisprudence, was sudden and immense. (*a*) In defiance of the command of Justinian to abstain from all notes or comments upon his laws, the civil law, on its revival, was not only publicly taught in most of the universities of Europe, but it was overloaded with the commentaries of civilians. From among the number of distinguished names, I would respectfully select Vinnius on the Institutes, Voet on the Pandects, and Perezius on the Code, together with the treatises on the civil law which abound in the works of Bynkershoek, Heineccius, and Pothier, as affording a mass of instruction and criticism most worthy of the attention and diligent examination of the student. (*b*)

The civil law had followed the progress of the Roman power into ancient Britain, and it was administered there by such an illustrious prætorian prefect as Papinian; and Reception in England.

(*a*) Esprit des Lois, liv. 28, c. 42. The original copy of the Pandects, supposed to have been found at Amalphi, has always been held in profound veneration. It was carried to Pisa, and from thence removed to Florence, and vigilantly guarded. This celebrated manuscript reposes at this day in the Lorenzo-Medicean Library.

(*b*) Since the beginning of the present century, a new historical school of the civil law has been instituted in Germany, which, in the opinion of some writers, has quite cast into the shade the illustrious jurisconsults of the 18th century. Among the most eminent of this new school may be placed the names of Hugo, Savigny, Niebuhr, Eichhorn, Haubold, &c., who have made profound researches into the antiquities of the Roman law, as well prior to the time of the decemvirs as during the feudal ages. They have undoubtedly enriched the science with acute and searching criticism, and enlarged and philosophical views, which shed light upon the character, wisdom, and spirit of the more ancient institutions. But I cannot but be of opinion (though with much deference) that the importance of the new Germanic school, as contradistinguished from that of the old professors, is greatly exaggerated; and that the Institutes and Pandects of Justinian, with the commentaries and writings of Voet, Vinnius, Heineccius, Pothier, and other illustrious civilians of the old school, furnish quite as much matter for reflection and useful application as the American student of our own common law can well attend to, and at the same time become a thorough master of his profession. It is said that Savigny has in course of publication a large work on the Pandects, in which he goes over the wide field of the Roman law. Such a work, and from so distinguished a scholar and jurist, will undoubtedly be of eminent utility, and a great improvement on the commentaries of the old civilians to whom I have alluded.

Selden thinks he was also assisted by Paulus and Ulpian. (*c*) After the Roman jurisprudence had been expelled by the arms of the northern barbarians, and supplanted by the crude institutions of the Anglo-Saxons, it was again introduced into the island, upon the recovery of the Pandects, and taught, in the first instance, with the same zeal as on the continent.

But the rivalship and even hostility which soon afterwards arose between the civil and common law, between the two universities and the law schools or colleges at Westminster, between *546 the clergy and laity, tended to check the *progress of the system in England, and to confine its influence to those courts which were under the more immediate superintendence of the clergy. (*a*) The ecclesiastical courts and the Court of Chancery accordingly adopted the canon and Roman law; and the Court of Admiralty, which was constituted about the time of Edward I., also supplied the defects of the laws of Oleron from the civil law, which was generally applied to fill up the chasms that appeared in any of the municipal institutions of the modern European nations. (*b*) A national prejudice was early formed against the civil law, and it was too much cultivated by English lawyers. Lord Coke mentions, by way of reproach, that William de la Pole, Duke of Suffolk, in the reign of Henry VI., endeavored to bring in the civil law, which gave occasion to Sir John Fortescue to write his work in praise of the English law; and the same charge was made one of the articles of impeachment against Cardinal Wolsey. (*c*) But the more liberal spirit of modern times has justly appreciated the intrinsic merit of the Roman system. Sir Matthew Hale, according to the account of Bishop Burnet, (*d*) frequently said, that the true grounds and reasons of law were so well delivered in the Digest, that a man could never well understand law as a science without first resorting to the Roman law for information, and he lamented that it was so little studied in England. And in *Lane* v. *Cotton*, (*e*) that strict English lawyer, Lord Holt, admitted

(*c*) Selden's Dissertatio ad Fletam, c. 4, sec. 3.

(*a*) Black's. Com. vol. i. Introductory Lecture; Reeves's History of the English Law, vol. i. pp. 81, 82; Millar's Historical View of the English Government, b. 2, c. 7, sec. 3.

(*b*) 3 Reeves's Hist. 198.

(*c*) 3 Inst. 208.

(*d*) Life of Sir M. Hale, p. 24.

(*e*) 12 Mod. 482.

that the laws of all nations were raised out of the ruins of the civil law, and that the principles of the English law were borrowed from that system, and grounded upon the same reason. (*f*)

* The value of the civil law is not to be found in questions which relate to the connection between the government and the people, or in provisions for personal security in criminal cases. In everything which concerns civil and political liberty, it cannot be compared with the free spirit of the English and American common law. (*a*) But upon subjects relating to private rights and personal contracts, and the duties which flow from them, there is no system of law in which principles are investigated with more good sense, or declared and

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Its merits.

(*f*) As the Roman jurisprudence, polity, and government existed in ancient Britain, as a Roman province, for upwards of three centuries and a half, the Roman civilization, with its laws, usages, language, arts, and manners, must have left a deep and permanent impression, and have become intermixed and incorporated with Saxon laws and usages, and constituted the body of the ancient English common law. A learned and able article in the Law Review and Quarterly Journal of British and Foreign Jurisprudence, vol. v., for November, 1846, entitled "Origin of the Common Law," concludes that the political government, the civil jurisprudence, and the judicial establishments which prevailed in England in the Anglo-Saxon period, had their main source in the Roman Law. This was the result of Mr. Spence's researches, in his Equitable Jurisdiction of the Court of Chancery, and which the very learned and candid author to whom I have alluded adopts, after a full investigation.

(*a*) The principles of the English common law, and the freedom and spirit which pervaded its institutions, civil and political, guided and sustained the American Revolution. The Congress of 1774 claimed and asserted, as their indubitable right, the rights of free and natural-born subjects, — such as the rights of life, liberty, and property, and the common law of England, to which their ancestral emigrants, and they, their descendants, were entitled; the right of the people to participate in the legislative power, and to be tried by their peers of the vicinage; and the benefit of such English statutes as existed at the time of their colonization, and were applicable to their circumstances. (Journal of Congress of October 14, 1774.) The fundamental English statutes, and which are the basis of English freedom, and clothed with the sanctity of constitutional provisions, are Magna Charta, the abolition of military tenures, the petition of right, the *habeas corpus* act, the bill of rights; and if I were reduced to the alternative of choosing for my protection of life, liberty, and property, between the Roman civil law and those common-law and statutory institutions to which I have alluded, I should infinitely prefer the latter, even to the entire compilation of the Institutes, the Pandects, and the Code of the Emperor Justinian. I agree entirely with the English judges at Westminster, in their answers to the celebrated articles, the *articuli cleri*, exhibited against them by Archbishop Bancroft, in the time of James I., in which they assert the superiority of trial of fact by a jury, and the *viva voce* evidence of witnesses to the paper proofs in the civil law courts, and in their duty to issue writs of *habeas corpus* in cases of undue imprisonment. See 2 Co. Inst. on the statute of 3 Ed. III., where a copy of the articles, and the answers to them, are given.

enforced with more accurate and impartial justice. I prefer the regulations of the common law upon the subject of the paternal and conjugal relations, but there are many subjects in which the civil law greatly excels. The rights and duties of tutors and guardians are regulated by wise and just principles. The rights of absolute and usufructuary property, and the various ways by which property may be acquired, enlarged, transferred, and lost, and the incidents and accommodations which fairly belong to property, are admirably discussed in the Roman law, and the most refined and equitable distinctions are established and vindicated. Trusts are settled and pursued through all their numerous modifications and complicated details, in the most rational and equitable manner. So, the rights and duties flowing from personal contracts, express and implied, and under the infinite variety of shapes which they assume in the business and commerce of life, are defined and illustrated with a clearness and brevity without example. In all these respects, and in many others, which the limits of the present discussion will not permit me to examine, the civil law shows the proofs of the highest cultivation and refinement; and no one who peruses it can well avoid the conviction, that it has been the fruitful source of those comprehensive views and solid principles which have been applied to elevate and adorn the jurisprudence of modern nations.

The Institutes ought to be read in course, and accurately studied, with the assistance of some of the best commentaries
* 548 * with which they are accompanied. Some of the titles in the Pandects have also been recommended by Heineccius to be read and re-read by the indefatigable student. The whole body of the civil law will excite never-failing curiosity, and receive the homage of scholars, as a singular monument of wisdom. It fills such a large space in the eye of human reason; it regulates so many interests of man as a social and civilized being; it embodies so much thought, reflection, experience, and labor; it leads us so far into the recesses of antiquity, and it has stood so long "against the waves and weathers of time," that it is impossible, while engaged in the contemplation of the system, not to be struck with some portion of the awe and veneration which are felt in the midst of the solitude of a majestic ruin.

PART IV.

OF THE LAW CONCERNING THE RIGHTS OF PERSONS.

LECTURE XXIV.*

OF THE ABSOLUTE RIGHTS OF PERSONS.

The rights of persons in private life are either absolute, being such as belong to individuals in a single, unconnected state; or relative, being those which arise from the civil and domestic relations.

The absolute rights of individuals may be resolved into the right of personal security, the right of personal liberty, and the right to acquire and enjoy property. These rights have been justly considered, and frequently declared, by the people of this country, to be natural, inherent, and unalienable. The effectual security and enjoyment of them depend upon the existence of civil liberty; and that consists in being protected and governed by laws made, or assented to, by the representatives of the people, and conducive to the general welfare. Right itself, in civil society, is that which any man is entitled to have, or to do, or to require from others, within the limits prescribed by law. The history of our colonial government bears constant marks of the vigilance of a free and intelligent people, who understood the best securities for political happiness, and the true foundation of the social ties. The inhabitants of the colonies of Plymouth and Massachusetts, in the infancy of their establishments, declared by law that the free enjoyment of the liberties * which humanity, civility, and *2 Christianity called for was due to every man in his place and

[* In the previous editions, Lecture XXIV. was the commencement of the 2d volume.]

proportion, and ever had been, and ever would be, the tranquillity and stability of the commonwealth. They insisted that they brought with them into this country the privileges of English freemen; and they defined and declared those privileges with a caution, sagacity, and precision that have not been surpassed by their descendants. Those rights were afterwards, in the year 1692, on the receipt of their new charter, reasserted and declared. It was their fundamental doctrine, that no tax, aid, or imposition whatever could rightfully be assessed or levied upon them without the act and consent of their own legislature; and that justice ought to be equally, impartially, freely, and promptly administered. The right of trial by jury, and the necessity of due proof preceding conviction, were claimed as undeniable rights; and it was further expressly ordained, that no person should suffer without express law, either in life, limb, liberty, good name, or estate; nor without being first brought to answer by due course and process of law. (*a*)

(*a*) Hazard's State Papers, vol. i. pp. 408, 487, edit. Philad. 1792; Hutchinson's Hist. of Massachusetts, vol. ii. p. 64; Revised Laws of Massachusetts, published in 1675; Baylie's Historical Memoir, vol. i. p. 229; Bancroft's Hist. vol. i. p. 452. It was a provision in the charters to the Virginian settlers, granted by James I., in 1606 and 1609, and in the charter to the colonists of Massachusetts in 1629, of the province of Maine in 1639, of Connecticut in 1662, of Rhode Island in 1663, of Maryland in 1632, of Carolina in 1663, and of Georgia in 1732, that they and their posterity should enjoy the same rights and liberties which Englishmen were entitled to at home. Such privileges were implied by law, without any express reservation. The like civil and religious privileges were conceded to New Jersey, by the proprietaries, in February, 1665. Bancroft's Hist. vol. ii. 316. In the free and liberal charter of Massachusetts of 1629, powers were granted to the whole body of the proprietors to make laws not repugnant to the laws of England. The colonists of New Plymouth assumed the necessary powers of government by an original compact among themselves, and which they subscribed before they landed on the rock of Plymouth; and which they had in contemplation before they embarked from Holland. Young's Chronicles of the Pilgrim Fathers, p. 95. All the New England colonies, on their first establishment, were pure democracies; none more so ever existed. The governments of Rhode Island, Connecticut, and New Haven were thus formed by voluntary compact. Under the first Massachusetts charter the legislative body was composed of the governor, assistants, and the whole freemen of the company *in person*. The first general court of *delegates* was in 1634. The freemen had become too numerous to assemble in a body, and Governor Winthrop directed that the towns should assemble in general court by deputies, to revise and make laws. The statute of 1636 declared, that the freemen of each town might choose, *by papers*, deputies to the general court. This was introducing voting by ballot. See Digest of Massachusetts Colony Laws, published in 1675; Winthrop's Hist. of New England, by Savage, vol. i. pp. 128, 185, 220; Drake's Hist. of Boston. For more than eighteen years the whole body of the

*The first act of the general assembly of the colony of Connecticut, in 1639, contained a declaration of rights in nearly the same language; (*a*) and among the early resolutions of the general assembly of the colony of New York, in 1691 and 1708, we meet with similar proofs of an enlightened sense of the provisions requisite for civil security. It was declared by them, (*b*) *3

male inhabitants of the old colony of Plymouth constituted the legislature. Bancroft's Hist. vol. i. p. 348. In 1636, the election of the governor and assistants by the freemen was declared to be annual, and, in 1638, the personal attendance of the freemen at the general court was deemed to be grievous, and each town was thenceforward to choose deputies. Brigham's edit. of Plymouth Colony Laws, 1836, pp. 36, 37, 63. And by statute, in 1671, Ibid. p. 258, *if any freeman did not appear at election in person, or by proxy, he was for such neglect to be amerced.* The free planters of Connecticut, in 1639, provided that the choice of officers was to be by ballot; and that if the general assembly or court was not at any time duly convened, the freemen might meet and hold the same, in person or by deputy. Chalmers says, that the introduction of representative government in Massachusetts was in violation of the charter of 1629; and this was the opinion of Sir George Treby, and other high legal authority in England. But though there was no express provision for it in the charter, it would seem to have been necessarily implied when the growth of the colony required it; and it was justified by the model of the English House of Commons, where the principle of representation was inherent and vital. The first assembly of Maryland, in 1635, consisted of the whole body of the freemen, and, in 1639, a representative assembly was established. Sparks's American Biography, N. S. vol. ix. Life of Governor Calvert.

(*a*) Trumbull's Hist. of Connecticut, vol i. p. 98; Laws of Connecticut, edit. Boston, 1672, edit. 1702, and edit. New London, 1715, by Timothy Green. The edition of 1702 I have not seen. The edition of 1672 was the first printed code. There was a code of laws compiled in 1650, and it was circulated in *written* copies read in each town.

(*b*) Journal of the Assembly of the Colony of New York, vol. i. pp. 6, 224. The general assembly of the colony of New York passed an act on the 13th of May, 1691, *declaratory of the rights and privileges* of the people of the colony. It was declared that a session of the general assembly should be held annually, and that every freeholder within the province, and every freeman of a corporation, were entitled to vote for members of the assembly; that no freeman was to be deprived of any rights or liberties, or condemned, but by the judgment of his peers or the law of the land; that no tax of any kind, or on any pretence, should be levied upon the persons or estates of any of the subjects of the province, except by the act of the general assembly; that all trials were to be by a jury of twelve men, and in all capital and criminal cases there was to be a previous indictment or presentment by a grand inquest; and that the tenure of all lands was to be in free and common socage. This declaratory act or charter of privileges contained several other provisions, but it was repealed by the king in 1697. Bradford's edition of Colony Laws, 1719. There was a prior act of the same purport, and nearly in the same words, passed by the first general assembly of the province in 1683, under the administration of the Duke of York. It was styled "The charter of liberties and privileges, granted by his royal highness to the inhabitants of New York." App. No. 2, to the Revised Edition of the Laws of New York in 1813, vol. ii.

that the imprisonment of subjects without due commitment for legal cause, and prescribing and forcing them into banishment, and forcibly seizing their property, were illegal and arbitrary acts. It was held to be the unquestionable right of every freeman to have a perfect and entire property in his goods and estate; and that no money could be imposed or levied, without the consent of the general assembly. The erection of any court of judicature without the like consent, and exactions upon the administration of justice, were declared to be grievances. Testimonies of the same honorable character are doubtless to be met with in the
*4 records of other colonial legislatures. It was regarded * and claimed by the general assemblies in all the colonies, as a branch of their sacred and indefeasible rights, that the exclusive power of taxation of the people of the colonies resided in their colonial legislatures, where representation of them only existed; and that the people were entitled to be secure in their persons, property, and privileges, and they could not lawfully be disturbed or affected in the enjoyment of either, without due process of law, and the judgment of their peers. (*a*) But we need not pursue our

(*a*) See, to this effect, in addition to the acts of Massachusetts, Connecticut, and New York, already mentioned, the declaratory act of the assembly of the Plymouth colony, in 1635, and also in 1658 and 1671. (Holmes's Annals, vol. i. p. 232; Baylie's Historical Memoir of the Colony of New Plymouth, vol. i. p. 229; Plymouth Colony Laws, edit. by Brigham, 1836, pp. 107, 241.) See, also, the declaration of their rights, by the assembly of Virginia, in 1624 and 1676; (Stith's Hist. of Virginia, p. 318; Chalmers's Annals, p. 64;) and of the assembly of Pennsylvania in 1682; and of the legislature of Maryland in 1639, and again in 1650; and of the assembly of Rhode Island in 1663; and of the proprietaries of Carolina in 1667; (Proud's Pennsylvania, vol. i. pp. 206, 208; Grahame's Hist. of the Colonies;) and of the concessions and agreements of the proprietaries of New Jersey in 1664; and of the fundamental constitutions by the proprietaries of East New Jersey in 1683; and of the declaratory acts of the general assembly of East New Jersey in 1682 and 1698; and of the concessions and agreements of the proprietaries and planters of West New Jersey, and called the great charter of fundamentals, in 1676; and of the declaratory act of the general assembly of West Jersey, in 1681. (Leaming's and Spicer's Collections, edit. Philad. folio, 1757, pp. 11–26, 153–166, 235, 240, 370, 372, 382, 411; Smith's Hist. of New Jersey, 126, 270–274, App. No. 1, 2.) The West New Jersey colonists in 1676, introduced voting by ballot, universal suffrage, the right and obligation of instructions, universal eligibility to office, and abolished imprisonment for debt. All this was done under the auspices of William Penn, whose influence contributed to plant West New Jersey, and who was a joint assignee and trustee of an undivided portion of West Jersey, as well as a joint owner by purchase with other partners of East Jersey. The declaration of the general assembly of Virginia, in 1624, that the governor should not lay, levy, or employ any taxes or impositions upon the colony, except by authority of the general assembly, was the first example of the assertion of such a right; as that

researches on this point, for the best evidence that can be produced of the deep and universal sense of the value of our natural rights, and of the energy of the principles of the common law, are the memorials of the spirit which pervaded and animated every part of our * country, after the peace of 1763, when the *5 same parent power which had nourished and protected us attempted to abridge our immunities, and retard the progress of our rising greatness.

The House of Representatives in Massachusetts, the House of Assembly in New York, and the House of Burgesses in Virginia, took an early and distinguished part, upon the first promulgation of English measures of taxation, in the assertion of their rights as freeborn English subjects. (*a*) The claim to common-law rights soon became a topic of universal concern and national vindication. In October, 1765, a convention of delegates from nine colonies assembled at New York, and made and published a declaration of

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house was the first popular representative body ever convened in America. Hening's Statutes, vol. i. pp. 118, 122; Story's Com. on the Const. vol. i. p. 26. The charter of the colony of Maryland, in 1632, was peculiarly liberal. It established an independent colonial legislation in the proprietary and the freemen or their deputies, and the crown stipulated never to levy any tax upon the inhabitants, and the inhabitants were to enjoy all the rights and privileges of English subjects. 1 Chalmers's Annals, pp. 202–205; 1 Hazard's Coll. p. 327. The first assembly of Maryland, in 1638, declared the great charter of England to be the measure of their liberties; and William Penn, in the preface to the plan of government prepared for Pennsylvania, in 1682, declared that any government is free to the people under it, *where the laws rule, and the people are a party to those laws.* Proud's Hist. of Pennsylvania, vol. ii. App. p. 7; Bacon's Laws, 1638, ch. 2.

(*a*) Minot's Hist. of Massachusetts, vol. ii. p. 175; Journals of Assembly of New York, vol. ii. pp. 769–780; Jefferson's Notes on Virginia, 189; Marshall's Life of Washington, vol. ii. p. 88, and Appendix, note No. 4; Wirt's Life of Patrick Henry, sec. 2. The assertion by the English House of Commons, in 1764, and prior to the Stamp Act, of a right to impose taxes upon the colonies, produced spirited and manly remonstrances to the King and Parliament from several of the colonial assemblies. Pitkin's Hist. of the United States, vol. i. pp. 165–169. The general assembly of the colony of New York, in October, 1764, not only asserted their exclusive right of taxing their constituents, but complained, at the same time, of the grievance of putting an end, by act of Parliament, to commercial intercourse between the colonies and foreign West India settlements. Journals of N. Y., Ibid. The Stamp Act was passed the 22d March, 1765, and this was the first measure of indirect taxation laid upon the colonies by the British Parliament for the mere purpose of revenue. The first resolutions of any of the colonial assemblies, after the passage of the Stamp Act, came from the house of burgesses of Virginia. They were introduced by Patrick Henry, in May, 1765, and asserted the right in the colonists of taxing themselves. Wirt's Life of Patrick Henry, sec. 2.

rights, in which they insisted that the people of the colonies were entitled to all the inherent rights and liberties of English subjects, of which the most essential were, the exclusive power to tax themselves, and the privilege of trial by jury. (*b*) The sense of America was, however, more fully ascertained, and more explicitly and solemnly promulgated, in the memorable declaration of rights of the first Continental Congress, in October, 1774, and which was a representation of all the colonies except Georgia. That declaration contained the assertion of several great and fundamental
*6 principles of American * liberty, and it constituted the basis of those subsequent bills of rights, which, under various modifications, pervaded all our constitutional charters. It was declared, "that the inhabitants of the English colonies in North America, by the immutable laws of nature, the principles of the English constitution, and their several charters or compacts, were entitled to life, liberty, and property; and that they had never ceded to any sovereign power whatever a right to dispose of either without their consent; that their ancestors who first settled the colonies were, at the time of their emigration from the mother country, entitled to all the rights, liberties, and immunities of free and natural-born subjects; and by such emigration they by no means forfeited, surrendered, or lost any of those rights; — that the foundation of English liberty, and of all free government, was the right of the people to participate in the legislative power, and they were entitled to a free and exclusive power of legislation, in all matters of taxation and internal policy, in their several provincial legislatures, where their right of representation could alone be preserved; that the respective colonies were entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law; that they were entitled to the benefit of such of the English statutes as existed at the time of their colonization, and which they had by experience found to be applicable to their several local and other circumstances; that they were likewise entitled to all the immunities and privileges granted and confirmed to them by royal charters, or secured by their several codes of provincial laws." (*a*) Upon the forma-

(*b*) Marshall's Life of Washington, vol. ii. p. 90, and Appendix, note No. 5.

(*a*) Journals of Congress, vol. i. p. 28, ed. Phil. 1800. It was a principle of the English common law, that acts of Parliament did not bind the English colonies *unless*

tion of the several state constitutions, * after the colonies had *7
become independent states, it was in most instances thought proper to collect, digest, and declare, in a precise and definite manner, and in the shape of abstract propositions and elementary maxims, the most essential articles appertaining to civil liberty and the natural rights of mankind. (*a*)

The precedent for these declaratory bills of rights was to be found, not only in the colonial annals to which I have alluded, but in the practice of the English nation, who had frequently been obliged to recover their indefeasible rights by intrepid councils, or by force of arms, and then to proclaim them by the most solemn and positive enactments, as a barrier against the tyranny of the executive power. The establishment of *Magna Charta*, and its generous provision for all classes of freemen against the complicated oppressions of the feudal system; the *petition of right*, early in the reign of Charles I., asserting by statute the rights of the nation as contained in their ancient laws, and especially in "the great * charter of the liberties of England"; and the *8
bill of rights at the revolution, in 1688, (*a*) are illustrious examples of the intelligence and spirit of the English nation, and they form distinguished eras in their constitutional history. (*b*)

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they were specially named. Blankard *v.* Galdy, 4 Mod. 222; 2 Salk. 411, S. C.; Sir Joseph Jekyll, in 2 P. Wms. 75. But the prevalent doctrine in the colonies, and one that was acted upon by some of the legislatures, was, that no act of Parliament was binding upon the colonies, *though named*, unless ratified by the colonial legislatures, and on the ground that they were not represented in Parliament. Hutchinson's History, vol. i. p. 322; Chalmers's Annals, 277, 400; Pitkin's Hist. of the United States, vol. i. pp. 91, 92, 96, 97. The original charter of Pennsylvania to William Penn contained a provision that no contribution should be levied on the inhabitants or their estates, unless by the consent of the proprietary or governor and assembly, or *by Act of Parliament in England.* Charter, sec. 2, Proud's Hist. of Pennsylvania, vol. i. p. 185. Yet this anomalous reservation of a power of taxation in Parliament was always understood by the colonists to imply, that the people of the province were to be allowed to send their representatives to Parliament previous to the exercise of the power. This was so asserted by Dr. Franklin, in his examination before the House of Commons in England, prior to the American war.

(*a*) Cicero, in his treatise De Republica, lib. 1, sec. 32, insisted that equality of rights was the basis of a commonwealth; for since property could not be equal, and talents were not equal, rights ought to be held equal among all the citizens of the state, which was, in itself, nothing but a community of rights.

(*a*) Act of 1 W. & M., sess. 2, ch. 2, entitled, "An Act declaring the rights and liberties of the subject, and settling the succession of the crown." See, also, *the Act of Settlement*, 12 & 13 Wm. III. ch. 2, and *ante*, 293.

(*b*) This free spirit of the English nation at the era of *Magna Charta* was not

But the necessity, in our representative republics, of these declaratory codes has been frequently questioned, inasmuch as the government, in all its parts, is the creature of the people, and every department of it is filled by their agents, duly chosen or appointed, according to their will, and made responsible for mal-administration. It may be observed, on the one hand, that no gross violation of those absolute private rights which are clearly understood and settled by the common reason of mankind is to be apprehended in the ordinary course of public affairs; and as to extraordinary instances of faction and turbulence, and the corruption and violence which they necessarily engender, no parchment checks can be relied on as affording, under such circumstances, any effectual protection to public liberty. When the spirit of liberty has fled, and truth and justice are disregarded, private rights can easily be sacrificed under the forms of law. On the other hand, there is weight due to the consideration, that a bill of rights is of real efficacy in controlling the excesses of party spirit. It serves to guide and enlighten public opinion, and to render it more quick to detect, and more resolute to resist, attempts to disturb private right. It requires more than ordinary hardiness and audacity of character to trample down principles which our ancestors cultivated with reverence; which we imbibed in our early education; which recommend themselves to the judgment of the world by their truth and simplicity; and which are constantly placed before the eyes of the people, accompanied with the imposing force and solemnity of a constitutional sanction. Bills of rights are part of the muniments of freemen, showing their title to protection, and they become of increased value when placed under the protection of an independent judiciary, instituted as the appropriate guardian of private right. Care, however, is to be taken, in the

peculiar to the Anglo-Saxon race in that island. We have an analogous and almost contemporary case in Denmark, upon the election of King Christopher II., in 1319. He was called upon by the diet or assembly of great men which elected him to sign a capitulation or charter, taken from preceding models, in which it was declared, not only that the feudal nobility and the clergy should be secure in their privileges and exemptions, but that the free peasants should not be subject to any tax contrary to the established laws and customs; that a parliament should be annually held at Wyborg; that no man should be imprisoned, or deprived of life and property, without public trial and conviction according to law; and that no law should be made or altered without consent of Parliament, consisting of the prelates and best men of the kingdom. Bishop Muller, on the Ancient History and Constitution of Denmark, noted in the Foreign Quarterly Review, No. 21.

digest of these declaratory provisions, to * confine the manual *9
to a few plain and unexceptionable principles. We weaken greatly the force of them if we incumber the constitution, and perhaps embarrass the future operations and more enlarged experience of the legislature, with a catalogue of ethical and political aphorisms, which, in some instances, may reasonably be questioned, and in others justly condemned. (*a*) In the revision of the con-

(*a*) The following instances may be mentioned as illustrations of the questionable nature of some of these declaratory provisions: —

Thus, several of the state constitutions, as those of New Hampshire, Massachusetts, Vermont, North Carolina, Ohio, Indiana, and Illinois, have made it an article in their bill of rights, that the people have a right not only to apply to the legislature by petition or remonstrance, but to "instruct their representatives." If, by this, be meant that they may give to their representatives wholesome advice or information, it is a palpable truth, and quite a harmless article; but if it be intended to declare that the people of a town or county or district may give binding instructions to their immediate delegates, and to which they must conform without any exercise of their own discretion in like manner as an agent or attorney in private business is bound by the directions of his principal, it would then render useless all discussion and deliberation in the legislature. This would be repugnant to the theory of government, which supposes that the representatives are to meet and consult together for the common welfare, and to have a regard, in the making of laws, to the greatest general good, and to make the local views and interest of a part of the community subordinate to the general interest of the whole. The principle of the English common law, applicable to the members of the British House of Commons, is deemed to be the true doctrine on this subject. Though chosen by a particular county or borough, the member, when elected and returned, serves for the whole realm. "When you choose a member," said Mr. Burke to the electors of Bristol, in 1774, "he is not a member of Bristol, but he is a member of Parliament." The end of his election is not particular, but general; not barely to advantage his constituents, but for the common weal; and he is not bound to take and follow the advice of his constituents upon any particular point, unless he thinks it proper and prudent so to do. (4 Inst. 14; 1 Blacks. Com. 159.) The representative (to use again the language of Burke) owes to his constituents, not his industry only, but his judgment; and he betrays, instead of serving them, if he sacrifices it to their opinion. The people cannot debate in their collective capacity. They can only deliberate and make laws by their representatives; and in the ordinary course of human affairs, the exercise of their sovereignty, and the means of their safety, will consist in the discreet selection of the rulers who are to administer the government of their choice. The earliest assertion of this important and undoubted constitutional principle, that each member of the House of Commons was deputed to serve, not only for his immediate constituents, but for the whole kingdom, was, according to Mr. Hallam, (Constitutional History of England, vol. i. p. 352,) made in Parliament, in 1571.[1]

So, it is declared, in some of the state constitutions, as Maryland, North Caarolina,

[1] The election of M. Drault, a member of the French Chamber of Deputies for Poitiers, was annulled by a vote of that body on the ground that he had contracted an engagement with the electors of Poitiers to vote for a certain measure. It may, per-

stitution of New York, in 1821, the declaration of rights was
*11 considerably enlarged; and yet * the most comprehensive, and the most valuable and effectual of its provisions, were to be found in the original constitution of 1777, as it was digested by some master statesman, in the midst of the tempest of war and invasion. It was declared, (*a*) that no authority should be exercised over the people or members of the state, on any pretence whatever, but such as should be derived from and granted

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and Tennessee, "that monopolies are contrary to the genius of a free government, and ought not to be allowed." This would seem to restrain the legislature from granting any exclusive privilege, even for a limited time, and prevent them from encouraging the introduction and prosecution of hazardous and expensive experiments in some art, science, or business calculated to be extensively useful. "A temporary monopoly of that kind," says Doctor Adam Smith, (Inquiry into the Wealth of Nations, vol. ii. p. 272,) "may be vindicated upon the same principles upon which a like monoply of a new machine is granted to its inventor, and that of a new book to its author." If the principle be correct, that all monopolies are contrary to the genius of a free state, it would condemn the power given to Congress to secure to authors and inventors the exclusive right to their writings and discoveries, and which species of monopoly is deemed to be exceedingly just and useful. Again: it is made an article in the declaration of rights, in the constitution of Illinois, that "there shall be no other banks or *moneyed institutions* in the state but those already provided by law, except a state bank and its branches." This is too general and too indefinite a restraint upon the exercise of the legislative discretion, and the subject seems scarcely of sufficient importance to have been classed among the "general, great, and essential principles of liberty and free government." In a commercial state, it would lead to the loss of many useful moneyed establishments, or what is more probable, it would be a temptation to efforts to elude the force of the article by evasive constructions. So, the provision in the declaration of rights in the constitution of Mississippi, that "no citizen shall be prevented from emigrating, *on any pretence whatever*," seems to be stated in terms too strong and unqualified, and it would require some latitude of interpretation to prevent the unjust application of the injunction to the case of persons emigrating with the fraudulent design of avoiding the payment of debt, or the discharge of a known duty, as the relief of bail or security. It is declared, in the constitution of Ohio, that "every association of persons, being regularly formed, and having given themselves a name, may, on application to the legislature, be entitled to letters of incorporation to enable them to hold estates, real and personal, for the support of their schools, academies, colleges, universities, *and other purposes*." The provision is too indefinitely expressed, and relates to a case of ordinary legislative discretion, and if literally carried into execution, it would be productive of great inconvenience. It does not seem to be deserving of a place among "the essential principles of liberty and free government to be forever unalterably established."

(*a*) Constitution of 1797, art. 1, 13, 41.

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haps, with some, detract from the authority of this case, that it occurred in the latter years of the reign of Louis Philippe, and was supported, in one of his most eloquent speeches, by M. Guizot.

by them; and that trial by jury, as formerly used, should remain inviolate forever; and that no bills of attainder should be passed, and no new courts instituted but such as should proceed according to the course of the common law; and that no member of the state should be disfranchised, or deprived of any of his rights or privileges under the constitution, unless by the law of the land or the judgment of his peers. Several of the early state constitutions had no formal bill of rights inserted in them; and experience teaches us that the most solid basis of public safety, and the most certain assurance of the uninterrupted enjoyment of our personal rights and liberties, consists, not so much in bills of rights, as in the skilful organization of the government, and its aptitude, by means of its structure and genius, and the spirit of the people which pervades it, to produce wise laws, and a pure, firm, and intelligent administration of justice.

I shall devote the remainder of the present lecture to examine more particularly the right of personal security and *personal liberty, and postpone the consideration of the right of private property until we arrive at another branch of our inquiries. *12

(1.) *Of the right of personal security*

The right of personal security is guarded by provisions which have been transcribed into the constitutions in this country from Magna Charta, and other fundamental acts of the English Parliament, and it is enforced by additional and more precise injunctions. The substance of the provision is, that no person, except on impeachment, and in cases arising in the military and naval service, shall be held to answer for a capital or otherwise infamous crime, or for any offence above the common-law degree of petit larceny, unless he shall have been previously charged on the presentment or indictment of a grand jury; (*a*) that no person shall

(*a*) In the case of the State *v.* Hardie, 1 Iredell (N. C.) 42, it was held, that an *information* in the nature of a *quo warranto*, to try the right to a franchise, was in the nature of a civil remedy, and not within the province of a bill of rights, that no freeman should be put to answer for any criminal charge, but by indictment, &c. But in New Hampshire the attorney-general may, *ex officio*, and in his discretion, file an information in all cases of offences and misdemeanors not capital or infamous. The State *v.* Dover, 9 N. Hamp. 468; and this seems to be the law also in the states of Maine and Massachusetts. The State *v.* Kittery, 5 Greenl. 254; Commonwealth *v.* Waterborough, 5 Mass. 259. The constitution of New York does not require an indictment in all criminal cases, for it excepts petit larcency; nor does it require trial

be subject, for the same offence, to be twice put in jeopardy of life or limb ; (*b*) nor shall he be compelled, in any criminal case, to be

by jury in cases of petit larceny, and of other offences not infamous, as in cases of vagrants, disorderly persons, &c., for the trial by jury had not been previously used in such cases. Duffy *v.* The People, 6 Hill, 75. In Ohio, also, it is held, that the legislature may direct the mode of redress, untrammelled by the constitutional provision of indictment or presentment, as to offences criminal or infamous, when the offences are but *quasi* criminal, as Sabbath-breaking, selling spirituous liquors contrary to law, and many other misdemeanors which may be given to the jurisdiction of justices of the peace, mayors, &c. Markle *v.* Akron, 14 Ohio, 589. These *summary convictions* are in derogation of the common law, without indictment or trial by jury, and are construed strictly, and rest for their validity on statute provisions. There must be a *record* of the proceeding, and an information or charge, and notice to the party, and a conviction, judgment, and execution. A review founded on the record may be had by *habeas corpus* or *certiorari*. The People *v.* Philips, N. Y. C. Court. See 5 N. Y. Legal Observer for April, 1847, p. 130.

(*b*) This prohibition, as to putting a party twice in jeopardy, is in the constitution of the United States, and it has been deemed by Mr. Justice Story to mean, that no person shall be tried a second time for the same offence, after a trial by a competent and regular jury, upon a good indictment, whether there be a verdict of acquittal or conviction.[1] A new trial cannot, therefore, be granted in a capital case, after a verdict regularly rendered upon a sufficient indictment; but it may where the jury has been discharged from giving a verdict, for then the party has not been put in jeopardy. United States *v.* Gibert, 2 Sumner, 19. But in opposition to this opinion, it has been adjudged by Mr. Justice McLean, in an equally elaborate opinion, in the case of the United States *v.* Keen, 1 McLean, 429, that the Courts of the United States have a constitutional power to grant new trials in capital as well as in other criminal cases. With respect to the right to *discharge* a jury in a capital case, when they cannot agree upon a verdict, it was held by the Supreme Court of the United States, in the case of The United States *v.* Perez, 9 Wheaton, 579, that the courts have a discretionary power, even in capital cases, (to be exercised with great caution and reserve,) to discharge the jury from giving a verdict, and that the prisoner may be tried again for the same offence. This question as to the power of the court to discharge a jury, sworn and charged in a capital case, before verdict, and to put the party accused upon trial a second time, for the same offence, after a verdict rendered, has been much discussed in the courts in this country, and the vigorous and powerful opposition to the power of the court by Mr. Justice Story, in the case of The United States *v.* Gibert, has given additional interest to the investigation. The cases in the American courts on the power of discharging a jury, in their sound discretion, before verdict, and of putting the party again on his trial, are fully collected in Wharton's American Criminal Law, edit. Philadelphia, 1846, pp. 146 – 155, 625 – 635. The result clearly is, that the power of the courts is settled, by overwhelming precedent and au-

[1] Where a person has been regularly tried for an offence, and acquitted by a jury, it has been held that a superior court cannot subject him to a second trial, by reversing the judgment of the inferior court upon the verdict. State *v.* Hand, 1 Eng. (Ark.) 169 ; State *v.* Denton, Id. 259. And that a writ of error will not lie in behalf of the people after judgment for the defendant in a criminal case. The People *v.* Corning, 2 Comst. 9.

a witness against himself; and in all criminal prosecutions, the accused is entitled to a speedy and public trial by an impartial jury; and upon the trial he is entitled to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence. And as a further guard against abuse and oppression in criminal proceedings, it is declared, that excessive bail cannot be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted; nor can any bill of attainder, or *ex post facto* law, be passed. The constitution of the United States, and the constitutions of almost every state in the Union, contain the same declarations in substance, and nearly in the same language. (*c*) And where express constitutional provisions on this subject appear to be wanting, the same principles are probably asserted by declaratory legislative acts; and they must be regarded as fundamental doctrines in every state, for the colonies were parties to the national declaration of rights in 1774, in which the trial by jury, and the other rights and liberties of English subjects, were peremptorily claimed as their undoubted * inheritance *13 and birthright. It may be received as a proposition, universally understood and acknowledged throughout this country, that no person can be taken or imprisoned; or disseised of his free-

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thority, in favor of the power of the courts to *discharge a jury before verdict*, after being charged in a capital case, when there is an absolute necessity for it, to be judged of by the court in its sound discretion, and that the accused may be put upon his trial *de novo*, and also that a new trial, after a verdict of *conviction*, may be awarded, for the party is not put in jeopardy a second time. That jeopardy already exists, and the only object of a second trial is to give the accused a chance of being relieved from it.

(*c*) In the ordinance of Congress of July 13th, 1787, for the government of the *territory of the United States northwest of the river Ohio*, it was declared to be an unalterable article of compact between the original states and the people and states in the said territory, that the inhabitants thereof should always be entitled to the benefit of the writ of *habeas corpus*, and of trial by jury; of judicial proceedings according to the course of the common law; that all persons should be bailable, unless for capital offences, where the proof shall be evident or the presumption great; that all fines should be moderate, and no cruel or unusual punishments inflicted; that no man should be deprived of his liberty or property but by the judgment of his peers, or the law of the land; that no man's property or services should be taken or demanded for public exigencies, without full compensation; and that no law ought ever to be made, or have force in the territory, interfering in any manner whatever with, or affecting private contracts or engagements *bona fide*, and without fraud previously formed. This last and valuable provision was at that time new and unprecedented in constitutional history.

hold or estate; or exiled or condemned; or deprived of life, liberty, or property, unless by the law of the land, or the judgment of his peers. The words, *by the law of the land*, as used originally in Magna Charta, (*a*) in reference to this subject, are understood to mean due process of law, that is, by indictment or presentment of good and lawful men; and this, says Lord Coke, (*b*) is the true

(*a*) Chapter 29.

(*b*) 2 Inst. 50. See, also, The matter of John and Cherry Streets, 19 Wendell, 659; Taylor *v.* Porter, 4 Hill (N. Y.) 145, 146, 147. *The law of the land*, in bills of right, says Ch. J. Ruffin, in the elaborate opinion delivered in Hoke *v.* Henderson, 4 Dev. (N. C.) 15, (and one replete with sound constitutional doctrines,) does not mean merely an act of the legislature, for that construction would abrogate all restrictions on legislative authority. The clause means, that statutes which would deprive a citizen of the rights of person or property without a regular trial, according to the course and usage of the common law, would not be the law of the land in the sense of the constitution. Mr. Justice Story, in his Commentaries on the Constitution, vol. iii. 661, and Mr. Justice Bronson, in 4 Hill (N. Y.) 146, 147, adopt the same construction. In South Carolina, the *law of the land*, in the constitution of that state, means the common and the statute law existing in that state at the adoption of its constitution. O'Neall, J., in the State *v.* Simons, 2 Speer, 767. In Tennessee, "the law of the land," in the constitution of that state, is understood in many cases to mean a general and public law, operating equally upon every member of the community; and every partial law, by which private property and the rights of individuals are abridged or taken away, is held to be against the constitution of the state. 2 Yerger, 554, 599; 10 Id. 71.[1] A statute declaring it to be felony to embezzle or make false entries by the officers of a specific bank, is held to be unconstitutional and void, as being a *partial* law, not embracing the officers of other institutions under similar circumstances. Budd *v.* The State, 3 Humph. (Tenn.) 483. The *judgment of his peers* means trial by a jury of twelve men, according to the course of the common law; and even in private suits at common law, the right of trial by jury is preserved in the constitution of the United States, where the value in controversy exceeds twenty dollars. Const. U. S. Amendments, art. 7, sec. 2.[2] In the constitution of New York it is declared, that trial by jury,

[1] In the interpretation of the celebrated twenty-ninth chapter of Magna Charta, containing the words, "nisi per legale judicium parium suorum vel *per legem terræ*," doubts have been entertained as to the meaning of the last words.

"Perhaps (says Mr. Hallam) the best sense of the disjunctive will be perceived by remembering that *judicium parium* was generally opposed to the combat or the ordeal, which are equally *lex terræ*." Supp. Notes to Middle Ages.

Such is also the construction of Mr. Reeves, 1 History of English Law, ch. 5, p. 249.

In Wynehamer *v.* The People, 13 N. Y. 393, the terms "law of the land" and "due process of law" were thus defined: The true meaning is, that where rights are acquired by the citizen under the existing law, there is no power in any branch of the government to take them away; but where they are held contrary to the existing law or are forfeited by its violation, they may be taken from him, not by an act of the legislature, but in the due administration of the law itself before the judicial tribunals of the state.

[2] Under the constitution and laws of the United States, the jury are not the judges

sense and exposition of those words. The better and larger definition of *due process of law* is, that it means law in its regular course of administration, through courts of justice. (Story, Com. on the Const., vol. iii. 264, 661.) [3]

But while cruel and unusual punishments are universally condemned, some theorists have proposed the entire abolition of the punishment of death, and have considered it to be an unnecessary waste of power, if not altogether unjust and unwarrantable. It has been supposed that the proper object of punishment, the protection of society by the prevention of crime, can be as well, or more effectually attained by the substitution of milder sanctions. The great difficulty is, to effect the salutary ends of punishment, and, at the same time, avoid wounding the public sense of human-

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"in all cases in which it has been heretofore used," should remain inviolate forever; and no new court should be instituted, except courts of equity, which should not proceed according to the course of the common law. Const. N. Y. art. 7. Under these provisions it has been adjudged, that the provision in the constitution of the United States, relative to trial by jury, applies only to *the federal courts;* and that the provision in the state constitution applies only to cases of trials of issues of fact in civil and criminal proceedings in *courts of justice;* and that the provision as to *new courts* referred to courts exercising the usual jurisdiction of courts of law, but proceeding *by modes unknown to the common law.* In the matter of Smith, 10 Wendell, 449; Cowen J., in the matter of John and Cherry Streets, 19 Wendell, 676; Lee *v.* Tillotson, 24 Wendell, 337. In Georgia, where the provision in the constitution securing trial by jury is the same as in that of New York, it has been adjudged, that it did not apply to summary jurisdictions known and in use before the adoption of the constitution. Low *v.* Commissioners of Pilotage, R. M. Charlton, 302. This has been, also, the contemporaneous and practical exposition of the same words in the constitution of New York. Lee *v.* Tillotson, 24 Wendell, 337. So, in Mississippi, it is held, in Lewis *v.* Garrett, 5 Howard, (Miss.) 434, that a statute authorizing summary proceedings, by motion against a sheriff and his sureties for official misconduct, is not a violation of the constitution which guaranties the right of trial by jury. That revision was not intended to disturb the ancient and established jurisdiction of the courts, and the modes of trial as regulated by the common law under Magna Charta.

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of the *law* in a trial for a crime; they are to take the law from the court, and apply it to the facts from the evidence, and thus frame their general verdict of guilty or not guilty. United States *v.* Morris, 1 Curtis C. C. 23.

A state legislature cannot make the right to a trial by jury dependent on giving a bond, with surety, for the payment of the penalty and costs. Greene *v.* Briggs, 1 Curtis C. C. 311; Webster *v.* Reid, 11 How. U. S. 437; Mitchell *v.* Harmony, 13 How. U. S. 142. The United States courts cannot deprive a party of the right of trial by jury of issues of fact, by referring such issues to referees. United States *v.* Rathbone, 2 Paine C. C. 578.

[3] See Murray's Lessee *v.* Hoboken L. & I. Co. 18 How. U. S. 272; Wynehamer *v.* The People, 3 Kernan, 378; People *v.* Berberrich, 11 How. Pr. Rep. 289.

ity. The punishment of death is, doubtless, the most dreadful and the most impressive spectacle of public justice; and it is not possible to adopt any other punishment equally powerful by its example. It ought to be confined to the few cases of the most atrocious character, for it is only in such cases that public opinion will warrant the measure, or the peace and safety of society require it. Civil society has an undoubted right to use the means requisite for its preservation; and the punishment of murder with death accords with the judgment and the practice of mankind, because the intensity and the violence of the malignity that will commit the crime require to be counteracted by the strong-
*14 est motives which can be presented to * the human mind.

Grotius (*a*) discusses much at large, and with his usual learning and ability, the design and the lawfulness of punishment; and he is decidedly of the opinion that capital punishments, in certain cases, are not only lawful, under the divine law, but indispensable to restrain the audaciousness of guilt. He recommends, however, for adoption, in many cases, the advice, and even the example of some of the ancients, by the substitution of servile labor and imprisonment for capital punishment. This has been done since his time to a very great extent in some parts of Europe, and especially in the United States. In the earlier code of laws prepared by William Penn, and adopted by the legislature of Pennsylvania, in 1682, (*b*) it was declared that *all prisons should be workhouses* for felons and vagrants; and the penitentiary system, founded on labor, discipline, and instruction, accompanied with patient and humane treatment, was first introduced into this country by the wisdom and benevolence of that eminent lawgiver. Though the penitentiary system has not been able sufficiently to answer the expectations of the public, either in the reformation of offenders, or as an example to deter others, yet the more skilful structure and arrangement of the prisons, and the introduction of a stricter and more energetic system of prison discipline, consisting essentially of separate and solitary confinement by night, and hard labor without solitude, and in companies, but without conversation, in the workshops, by day, (and which have been carried into effect with beneficial results in the state prison at Auburn, and the new state prison at Sing-Sing, in New York, and at Wethers-

(*a*) De Jure Belli, b. 2, c. 20.

(*b*) Proud's History of Pennsylvania, vol. ii. App. p. 16.

field in Connecticut,) afford encouraging expectations that they will be able to redeem the credit of the system, and recommend the punishment of solitary imprisonment and hard labor, instead of capital and other sanguinary punishments, to the universal approbation of the civilized world. (*c*)

(*c*) In Philadelphia, in 1829, a further reform in prison discipline was introduced, and is spoken of with high approbation by competent judges. It consists of solitary confinement by night, and being separate from associates in guilt *by day*, and labor by day. Purdon's Dig. 455. Doctor Lieber, in his Letter to the President of the Philadelphia Society for alleviating the miseries of public prisons, and in his Letter to the Governor of South Carolina on the penitentiary system, comes out with great strength in favor of the Philadelphia system in preference to the Auburn plan of discipline. See, also, the Lettre sur le système pénitentiaire, par M. Demetz, Counseiller à la cour royale, Paris, 1837, in which the Philadelphia plan of solitude by night and by day is ably enforced; and the system was approved of, after full discussion by the Conseil Général du Département de la Seine, October 20th, 1837. But notwithstanding all this sanction, it would seem that competent persons of experience have raised a doubt as to the good effects of total and absolute solitary confinement by day and night, in consequence of its deleterious effects upon the body and mind of the prisoner. Doctor Lieber distinguishes the one system as the Auburn or silent system, and the other as the Pennsylvania separate or eremitic system. The Boston Prison Discipline Society has been a strenuous and able advocate of the Auburn or congregate system, in opposition to the Pennsylvania or separate system. On the other hand, Miss D. L. Dix, in her "Remarks on Prisons and Prison Discipline in the United States," 1845, after a thorough review of the penitentiaries in the United States, gives her opinion in favor of the superior efficacy of the separate as distinguished from the congregate system, upon the morals of the convicts. The work is written with great good sense and knowledge of facts, and with admirable temper and candor. The Pennsylvania or separate system, by which the convicts are kept separate from each other not only at night, but by day, when at hard labor, is the one now prevalent in Europe, and it has high authorities, both in Europe and America, in its favor. The plan is seclusion from associates by day, accompanied by manual labor, with moral and religious instruction, and solitary confinement at night. The subject of penal laws is replete with difficulties. It is understood, in England, that transportation, as a punishment and discipline, has been a failure, either as means to deter from crime, or to reform the convicts. In a report made in the English House of Commons, in 1838, it was stated, that instead of reforming it had a corrupting influence, and was continually enlarging the Australian territories by colonists, most thoroughly depraved, as respected both the character and degree of their vicious propensities. If this be so, the grievance was most alarming, for in Great Britain about 5,000 persons annually undergo the sentence of transportation. But great and most commendable, and apparently judicious amendments and improvements were made by the British government in 1842, to meliorate the condition of convict discipline in Van Diemen's Land and Norfolk Island. See the able and interesting Despatches of Lord Stanley, Secretary of State for the Home Department, to Sir John Franklin, Lieutenant-Governor of Van Diemen's Land, published by order of the House of Commons, April, 1843. It appears that 1,000 convicts are sent annually from Great Britain to Norfolk Island in Australia, and the number of convicts resident there is not usually above 3,000. That 8,000 convicts are employed in labor in Van Diemen's Land. The course of

* 15 * While the personal security of every citizen is protected from lawless violence by the arm of government and the ter-

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discipline is, that every convict is subject to successive stages of punishment, decreasing in rigor at each successive step, unless the transit to a less severe punishment be withheld, owing to misconduct in the convict; (1.) Detention at Norfolk Island four years; (2.) The probationary gang removed to Van Diemen's Land and kept at labor two years; (3.) The probation passes five years; (4.) Tickets of leave; (5.) Pardons, absolute or conditional. Great efforts are made for the melioration of female convicts, and 600 of them annually pass through the penitentiaries.

In the case of wanton and malicious mischief, corporal chastisement seems to be deemed a suitable punishment in whole or in part in the adoption of means to prevent it. Thus, for the better protection of works of art, and of scientific and literary collections, the statute of 8 and 9 Victoria, c. 44, declares that such trespassers shall be subjected to six months' imprisonment with hard labor, *and with the wholesome discipline of one, two, or three whippings.*

It appears now (1847) to be the policy of the British government to qualify or abolish transportation to Australia, or to any British settlement more distant than Gibraltar or the Bermudas, where the hulk system, as it exists at Woolwich, is in operation, and to substitute for the present punishment reformatory establishments, or a preparatory period of punishment, and a subsequent system of compulsory labor, and that no released convict shall be permitted to remain thereafter in the United Kingdom. Some modification of that kind has been suggested as a substitute for transportation, though with the preservation of transportation to a qualified degree.

There were, as early as 1834, sixteen of the United States, viz.: Maine, New Hampshire, Vermont, Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, Maryland, Virginia, Kentucky, Tennessee, Georgia, Ohio, Indiana, and Illinois, besides the District of Columbia, which had penitentiaries or state prisons, established and supported by government. The system is extending and growing better in this country by the lights of experience, and in 1838 the prisons in eight or nine of the states had become a source of revenue to the public, as the earnings of the convicts, by their labor, left a clear gain above all expenses. It has attracted attention in Europe, and gentlemen of character and ability from England, France, and Prussia, have visited the United States, under the auspices of their respective governments, in order to inspect our prisons, and obtain a thorough knowledge of the plan, discipline, and effects of our penitentiary systems. To these visits we are indebted for the interesting work of M. M. G. de Beaumont et A. de Tocqueville, entitled Du Système Pénitentiaire aux Etats-Unis, et de son application en France, Paris, 1833; and which has been translated, with notes, by Dr. Francis Lieber, advantageously known to the literary world as the editor of that great work, the Encyclopædia Americana; also for the Report of William Crawford, Esq., on the Penitentiaries of the United States, presented to the British government, and ordered to be printed in March, 1835. His appendix to this report contains an extraordinary and very valuable mass of facts and details on the subject, collected with great industry and care, and accompanied with excellent plans of our principal state penitentiaries. The whole work is very instructive, and ought to be republished in this country. The French visitants collected also documentary and statistical matter relative to our state prisons, amounting to six volumes in folio, which have not been published, but were deposited in the office of the minister of commerce and public works at Paris.

Doctor Julius, a learned professor at Berlin, in Prussia, under the direction of his government, visited the United States on the same errand in the years 1834, 1835

rors of the penal code, and while it is equally guarded from unjust and tyrannical proceedings on the part of the government itself, by the provisions to which we have referred, every person is also entitled to the preventive arm of the magistrate, as a further protection from threatening or impending danger; and, on reasonable cause being shown, he may require his adversary to be bound to keep the peace. If violence has been actually offered, the offender is not only liable to be prosecuted and punished on behalf of the state, but he is bound to render to the party aggrieved adequate compensation in damages. (*a*) The municipal law of

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and 1836; and in 1839, his work, in two volumes, on the Moral Condition of the United States, was published at Leipsic, in Germany, and the second volume was wholly occupied with the subject of crime and punishment.

In 1830, a bill passed the English House of Commons abolishing the punishment of death for forging negotiable securities; but this alteration in the established law was rejected by a large majority in the House of Lords.

(*a*) The rule or measure of damages, in actions at law, for a compensation for civil injuries to the person or property or character, has been recently extensively discussed, and with superior learning, ability, and candor, in "A Treatise on the Measure of Damages, by Theodore Sedgwick, Esq., New York, 1847," a work greatly wanted, and which, from its intrinsic merits, will recommend itself strongly to the patronage of the profession. The general rule is, that if a case be free from fraud, malice, wilful negligence, or oppression, the compensation is taken strictly for the real injury or actual pecuniary loss to the party, and perhaps the natural and legal consequences of the act complained of, and the actual costs and expenses sustained. But if fraud, malice, or *mala mens* mingle in the controversy, the claim goes beyond *absolute* compensation, and punitive, vindictive, or exemplary damages, by way of punishment and for example's sake, seem to be admitted to the jurisprudence of England and of this country. This Mr. Sedgwick has shown by numerous cases from 2 Wils. 205; 3 Id. 18; 13 Mees. & W. 47; 1 Wash. C. C. 152; 3 Johns. 56, 64; 14 Id. 352; 2 Mason, 120; 10 N. Hamp. 130; 15 Conn. 225, 267; Story J., 3 Wheaton, 546; Baldwin J., 1 Bald. C. C. 138. The learned author of the treatise further shows, that in the Scotch courts the rule of absolute compensation for civil injuries is adhered to without converting the suit into a matter of punishment, or going beyond compensatory damages; and this seems to be the sounder rule in the opinion of Mr. Metcalf and Professor Greenleaf, the eminent jurists to whom Mr. Sedgwick refers, while he frankly gives his own reasons for what he deems the better conclusion in the English and American law. It follows necessarily that, except in matters of contract, the amount of damages, when bad passion or motives are intermixed, must be left to the sound discretion of a jury, to be exercised according to the circumstances, and under the wise superintendence of the court. See Measure of Damages by Sedgwick, pp. 27–46, pp. 75, 76, and ch. 3, and ch. 18 of that treatise. But in cases of loss without aggravation or intentional wrong, the law confines itself to a complete indemnity, without adding exemplary damages, or estimated profits, or remote consequences. 2 Dallas, 303; 2 Wheaton, 327; 3 Id. 546; 17 Pick. 543; 2 Taunt. 314; 23 Wendell, 425; Sedgwick's Treatise, pp. 89–93. It is difficult to deduce any precise measure of damages from the numerous cases, but the courts have in these cases discountenanced the idea of speculative or remote damages, though it is impossible to ascertain any certain rule

our own as well as of every other country has likewise left with individuals the exercise of the natural right of self-defence, in all those cases in which the law is either too slow or too feeble to stay the hand of violence. (*b*)[1] Homicide is justifiable in every case in which it is rendered necessary in self-defence, against the person who comes to commit a known felony with force against one's person or habitation, or against the person of those who stand near in domestic relations. (*c*) The right of self-defence in these cases is founded on the law of nature, and is not and cannot be superseded by the law of society.[2] In those instances, says Sir Michael Foster, the law, with great propriety, and in strict justice, considers the individual to be under the protection of the law of nature. There are some important distinctions on this subject, between justifiable and excusable homicide, and manslaughter and murder, which it does not belong to my present purpose to examine; and I will only observe, that homicide is never strictly
*16 justifiable in defence * of a private trespass, nor upon the pretence of necessity, when the party is not free from fault in bringing that necessity upon himself. (*a*)

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from the numerous cases which remarkably illustrate "the oscillations of the judicial pendulum." The numerous cases under the head of *remote and consequential damages* are most industriously collected by Mr. Sedgwick in the 3d chapter in his treatise, and to that I must refer the student. In the Law Reporter, Boston, No. 9, April, 1847, there is an elaborate review of the cases in matters of tort on the subject of exemplary damages, endeavoring to show that the decisions do not, on a strict examination and construction of the language of them, amount to authorities for going beyond compensatory damages. On this subject it appears to me that the conclusions in Mr. Sedgwick's treatise are well warranted by the decisions, and that the attempt to exclude all consideration of the malice and wickedness and wantonness of the tort, in estimating a proper compensation to the victim, is impracticable, visionary, and repugnant to just feelings of social sympathy. In trespass, when the party wantonly violates the law, "the jury should not be sparing in the damages." Lord Abinger, 1 Mees. & W. 342.

(*b*) See *infra*, p. 340, *note*.

(*c*) Hawk. P. C. b. 1, c. 28, sec. 21; Foster's Discourse of Homicide, 273, 274.

(*a*) Hawk. P. C. b. 1, c. 28, sec. 22, 23; In the State *v.* Morgan, 3 Iredell (N. C.)

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[1] See an able essay on the law of Homicide, in the North American Review for January, 1851. It is understood to have been written by Professor Parker, of the Law School of Harvard University, lately the able Chief Justice of New Hampshire.

[2] To justify a homicide in self-defence, it must be committed under the actual or supposed pressure of imminent danger to life or of great bodily harm. The danger need not in fact exist, if the circumstances furnish a reasonable ground of apprehension. Shorter *v.* The People, 2 Comst. 193; People *v.* Sullivan, 3 Selden (7 N. Y.) 396; Maher *v.* The People, 24 Ill. 241; Logue *v.* Commonwealth, 38 Penn. St. 265.

(2.) *Of slander and libels.*

As a part of the right of personal security, the preservation of every person's good name from the vile arts of detraction is justly included. The laws of the ancients, no less than those of modern nations, made private reputation one of the objects of their protection. The Roman law took a just distinction between slander spoken and written; and the same distinction prevails in our law, which considers the slander of a private person by words in no other light than a civil injury, for which a pecuniary compensation may be obtained. (*b*) The injury consists in falsely and maliciously charging another with the commission of some public offence, criminal in itself, and indictable, and subjecting the party to an infamous punishment, or involving moral turpitude, or the breach of some public trust, or with any matter in relation to his particular trade or vocation, and which, if true, would render him unworthy of employment; or, lastly, with any other matter or thing by which special injury is sustained. (*c*)[1] But if the slander be

186, 193, it was declared, that killing a person to prevent a mere trespass on his property, whether the trespass could or could not be otherwise prevented, is murder.

(*b*) Potter's Greek Antiq. vol. i. p. 179; Halhed's Gentoo Code, 182; Cicero de Republica, lib. 4; Tacit. Ann. lib. 1, c. 72; Hor. Epist. b. 2, Ep. 1, 52; Aul. Gel. b. 3, c. 3; Inst. 4, 4, 1; 3 Johnson's Cases, 382, note; where the reporter, with great learning and accuracy, has collected the material provisions in the Roman law on the subject. Since the publication of that note, the view of the law of defamation among the ancients has been extensively considered in Holt's Law of Libel, b. 1, c. 1. See, also, the excellent Preliminary Discourse to Mr. Starkie's treatise on Slander and Libel; in which illustrations are drawn from the Roman and the Scotch laws, and the necessity of legal restraints upon slanderous and libellous attacks on the character of individuals is clearly enforced with strong sense and learning, and with great beauty and simplicity.

(*c*) Brooker *v.* Coffin, 5 Johns. 188; Spencer C. J., in Van Ness *v.* Hamilton, 19 Johns. 367; McCuen *v.* Ludlum, 2 Harr. (N. J.) 12. In Indiana, charging by words a female with incest, fornication, adultery, or whoredom, is made actionable without showing special damages. R. Statutes of Indiana, 1838, p. 452.[2]

[1] But certain words are actionable *in themselves*, without showing other special damage than that they deeply wound the feelings, and bring the party charged into contempt and disgrace. Malone *v.* Stewart, 15 Ohio, 319; Watson *v.* McCarthy, 2 Kelly, 57.

There may also be slander of title to property; which consists in falsely and maliciously denying the plaintiff's title, whereby he suffers some injury. Kendall *v.* Stone, 2 Sandf. (N. Y.) 269.

[2] In Virginia, all words which from their usual construction and common acceptation are construed as insults, and tend to violence and breach of the peace, are made actionable; and no demurrer shall preclude a jury from passing thereon. Code of Va.

communicated by pictures, or signs, or writing, or painting, it is calculated to have a wider circulation, to make a deeper impression, and to become proportionably more injurious. Expressions which tend to render a man ridiculous, or degrade him in the esteem and opinion of the world, would be libellous if printed, though they would not be actionable if spoken. (*d*) A libel, as ap-
*17 plicable to individuals, has been * well defined (*a*) to be a malicious publication, expressed either in printing or writing, or by signs or pictures, tending either to injure the memory of one dead, or the reputation of one alive, and expose him to public hatred, contempt, or ridicule. A malicious intent towards government, magistrates, or individuals, and an injurious or offensive tendency, must concur to constitute the libel. It then becomes a grievance, and the law has accordingly considered it in the light of a public as well as a private injury, and has rendered the party not only liable to a private suit at the instance of the party libelled, but answerable to the state by indictment, as guilty of an offence tending directly to a breach of the public peace. (*b*)[1]

(*d*) Villers *v.* Monsley, 2 Wils. 403; Woodard *v.* Dowsing, 2 Mann. & Ryl. 74; Levy *v.* Milne, 12 J. B. Moore, 418; Clement *v.* Chivis. 9 Barn. & Cress. 174; Lord Churchill *v.* Hunt, 1 Chitty, 480; Cooper *v.* Greeley, 1 Denio, 347; Clark *v.* Binney, 2 Pick. 113; Starkie on Slander, by Wendell, vol. i. 169. The law implies malice, if the publication charges an individual with an indictable offence, or exposes him to hatred, ridicule, or contempt. Mr. Hamilton, in his argument in the case of The People *v.* Croswell, 3 Johns. Cas. 354, submitted the following definition of a libel, in its most comprehensive sense, as being "a censorious or ridiculing writing, picture, or sign, made with a mischievous and malicious intent towards government, magistrates, or individuals." This definition of a libel was adopted by the court in The People *v.* Croswell, 3 Johns. Cas. 354, and approved of by the court in Steele *v.* Southwick, 9 Johns. 215.

(*a*) 4 Mass. 168; 2 Pick. 115; 2 Humph. 512; 5 Binney, 340; 3 Harr. 407.

(*b*) 1 Hawk. P. C. b. 1, c. 73; Foster *v.* Commonwealth, 8 Watts & Serg. 77. The malicious and unauthorized publication of any part of a letter, wilfully opened by a person to whom it was not addressed, or the wilfully opening or reading the same by any such person not authorized so to do, is declared to be a misdemeanor. New York Revised Statutes, vol. ii. p. 695, sec. 27, 28.

ch. 148. To publish of a man that he is insane is libellous. Perkins *v.* Mitchell, 31 Barb. (N. Y.) 461. A fair and honest criticism of a work of art, or of a literary production, is not a libel. Paris *v.* Levy, 9 C. B. (N. S.) 342.

[1] The plaintiff in a libel suit may recover not only compensation for actual pecuniary loss, but also for mental suffering, the circumstances of indignity under which the injury was done, the public disgrace inflicted, and other actual discomfort, and this whether the wrong was wanton, or done believing the charges published to be true. Exemplary

But though the law be solicitous to protect every man in his fair fame and character, it is equally careful that the liberty of speech, and of the press, should be duly preserved. The liberal communication of sentiment, and entire freedom of discussion, in respect to the character and conduct of public men, and of candidates for public favor, is deemed essential to the judicious exercise of the right of suffrage, and of that control over their rulers, which resides in the free people of the United States. It has, accordingly, become a constitutional principle in this country, that "every citizen may freely speak, write, and publish his sentiments, on all subjects, being responsible for the abuse of that right, and that no law can rightfully be passed to restrain or abridge the freedom of speech or of the press."

The law of England, even under the Anglo-Saxon line of princes, took severe and exemplary notice of defamation as *an offence against the public peace; (*a*) and in the time of *18 Henry III., Bracton (*b*) adopted the language of the Institutes of Justinian, and held slander and libellous writings to be actionable injuries. But the first private suit for slanderous words to be met with in the English law was in the reign of Edward III., and for the high offence of charging another with a crime which endangered his life. (*c*) The mischiefs of licensed abuse were felt to be so extensive and so incompatible with the preservation of peace, that several acts of Parliament, known as the statutes *de scandalis magnatum*, were passed to suppress and punish the propagation of false and malicious slander. (*d*) They are said to have been declaratory of the common law, (*e*) and actions of slander were slowly but gradually multiplied between the time of Edward III. and the reign of Elizabeth, (*f*) when they had become frequent. The remedy was applied to a variety of cases; and in a private action of slander for damages, and even in the action of

(*a*) 2 Inst. 227.
(*b*) Lib. 3, De Actionibus, ch. iv.
(*c*) 30 Ass. 29; Reeves, History of the English Law, vol. iii. p. 90.
(*d*) Statutes of 3 E. I., 2 R. II., and 12 R. II.
(*e*) 2 Mod. 161, 165.
(*f*) 4 Co. 12 – 20.

and vindictive damages may be allowed by a jury in cases of libel, where the wrong was wantonly committed, and with actual malice and intent to injure. Fry *v.* Bennett, 4 Duer (N. Y.) 247; Cramer *v.* Noonan, 4 Wisc. 231.

scandalum magnatum, the defendant was allowed to justify, by showing the truth of the fact charged; for if the words were true, it was then a case of *damnum absque injuria*, according to the just opinion of Paulus, in the civil law. (*g*) But in the case of a public prosecution for a libel, it became the established principle of the English law, as declared in the Court of Star Chamber about the beginning of the reign of James I., (*h*) that the truth of the libel could not be shown by way of justification, because, whether true or false, it was equally dangerous to the public peace. The
*19 same *doctrine remains in England to this day unshaken, and in the case of *The King* v. *Burdett*, (*a*) it was held that where a libel imputes to others the commission of a triable crime, the evidence of the truth was inadmissible, and that the intention was to be collected from the paper itself, unless explained by the mode of publication, or other circumstances; and that if the contents were likely to produce mischief, the defendant must be presumed to intend *that* which his act was likely to produce. "The liberty of the press," as one of the judges in that case observed, "cannot impute criminal conduct to others, without violating the right of character, and that right can only be attacked in a court of justice, where the party attacked has a fair opportunity of defending himself. Where vituperation begins, the liberty of the press ends." Whether the rule of the English law was founded on a just basis, and whether it was applicable to the free press and free institutions in this country, has been a question extensively and laboriously discussed in several cases which have been brought before our American tribunals.

In the case of *The People* v. *Croswell*, (*b*) which came before

(*g*) Dig. 47, 10, 18.

(*h*) De Libellis famosis, 5 Co. 125; Hudson's Treatise on the Star Chamber, published in 2d vol. Collec. Jurid.

(*a*) 4 B. & Ald. 95.

(*b*) 3 Johns. Cas. 337. The legislature of New York, in April, 1805, passed a declaratory law, that on indictment or information for a libel the jury had the right to determine the law and the fact, under the direction of the court, as in other criminal cases; and that the defendant upon the trial might give in evidence, in his defence, the truth of the matter contained in the publication. The act as to the former part of it was taken from the English statutes of 32 Geo. III. c. 60. See, also, the provision on this subject in the Amended Constitution of New York, *post*, p. 22. The English Court of Q. B., in Baylis *v.* Lawrence, 11 Adolph. & Ellis, 920, held the practice under the stat. of 32 Geo. III. to be, that the judge left it to the jury to say whether, under all the circumstances, the publication amounted to a libel. The judge may, but he is

the Supreme Court of New York in 1804, and was argued at the bar with very great ability, the court were equally divided in opinion on the point, whether, on an indictment for a libel, the jury had a right to determine the law and the fact under the direction of the court, as in other criminal cases, and whether the defendant was entitled to give in evidence to the jury the truth of the charges contained in the libel. In the court of Appeals in South Carolina, in 1811, the court unanimously decided, in the case of *The State* v. *Lehre*, (*c*) that by the English common law it was settled, on sound principles of policy derived from the civil law, that the defendant had no right to justify the libel by giving the truth of it in evidence. The court, in the learned * and able opinion which was delivered in that * 20 case, considered that the law, as then declared, was not only the law of England, but probably the law of all Europe, and most of the free states of America. The same question has been frequently discussed in Massachusetts. In the case of *The Commonwealth* v. *Chase*, (*a*) in 1808, it was decided that the publication of a libel maliciously, and with intent to defame, was clearly a public offence, whether the libel be true or not; and the rule was held to be founded on sound principles, indispensable to restrain all tendencies to breaches of the peace, and to private animosity and revenge. The essence of the offence consisted in the malicious intent to defame the reputation of another; and a man may maliciously publish the truth against another with the intent to defame his character, and if the publication be true, the tendency of the publication to inflame the passions, and to excite revenge is not diminished. But though a defendant on an indictment for a libel cannot justify himself for publishing the libel, merely by proving the truth of it,[1] yet he may repel the criminal charge, by proving that the publication was for a justifiable purpose, and not malicious; and if the purpose be justifiable,

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not bound to give his opinion. He acts in his discretion. See, also, Fairman *v.* Ives, 5 B. & Ald. 642, to the same point.

(*c*) 2 Rep. Const. Court, (1st series,) p. 809.

(*a*) 4 Mass. 163; State *v.* Burnham, 9 N. Hamp. 34, S. P.

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[1] It is no *justification* of a libel that the author names his informant, or that he did not expect his words to be believed. Johnston *v.* Lance, 7 Iredell, 448; Hatch *v.* Potter, 2 Gill. 725.

the defendant may give in evidence the truth of the words, when such evidence will tend to negative the malicious intent to defame. (*b*) The same question was again agitated and discussed before the same court, in 1825, in the case of *The Commonwealth* v. *Blanding*, (*c*) and the court strongly enforced the doctrine of the former case, that, as a general rule, the truth of the libel was not admissible in evidence upon the trial of the indictment; and this principle of the common law was declared to be founded in common sense and common justice, and prevailed in the code of every civilized country. It was further held, that whether in any particular case such evidence be
*21 admissible, was to be determined * by the court; and if admissible, then the jury were to determine whether the publication was made with good motives and for justifiable ends. The same rule, that the truth cannot be admitted in evidence on indictment for a libel, though it may be in a civil suit for damages, has been adjudged in Louisiana; (*a*) and the weight of judicial authority undoubtedly is that the English common-law doctrine of libel is the common-law doctrine in this country, in all cases in which it has not been expressly controlled by constitutional or legislative provisions. The decisions in Massachusetts and Louisiana were made notwithstanding the constitution of the one state had declared, that "the liberty of the press ought not to be restrained," and that the other had said that "every citizen might freely speak, write, and print on any subject, being responsible for the abuse of that liberty." Those decisions went only to control the malicious abuse or licentiousness of the press, and that is the most effectual way to preserve its freedom in the

(*b*) Giving the name of the author to *oral* slander at the time of its repetition is no justification in this country, in an action of slander. Mapes *v.* Weeks, 4 Wendell, 659; Inman *v.* Foster, 8 Id. 602; Dole *v.* Lyon, 10 Johns. 447; Treat *v.* Browning and wife, 4 Conn. 408. This seems to be the better opinion also of Mr. Starkie, in his Treatise on Slander and Libel, vol. i. 300, Wendell, 1843; and of English judges in the more recent cases. Holroyd J., and Best J., in Lewis *v.* Walter, 4 B. & Ald. 613–615; Best C. J., in De Crespigny *v.* Wellesley, 5 Bing. 392. Though it was otherwise in England until recently. Davis *v.* Lewis, 7 Term Rep. 17; Maitland *v.* Goldney, 2 East, 426; and so held in S. Carolina, in Miller *v.* Kerr, 2 McCord, 285. Nor is it any defence either in England or America, in an action for a *libel*. Dole *v.* Lyon, *ut supra;* Runkle *v.* Meyer, 3 Yeates (Penn.) 518. See Wendell's edition of Starkie on Libel, Int. 24, and vol. i. 301, note.

(*c*) 3 Pick. 304.

(*a*) Territory *v.* Nugent, Christy's Dig. of Louisiana Decisions, tit. Ev. No. 161.

genuine sense of the constitutional declarations on the subject. Without such a check, the press, in the hands of evil and designing men, would become a most formidable engine, and as mighty for mischief as for good. Since the decision in 1825, the legislature of Massachusetts have interposed, and by an act passed in March, 1827, have allowed the truth to be given in evidence in all prosecutions for libels, but with a proviso that such evidence should not be a justification, unless it should be made satisfactorily to appear upon the trial, that the matter charged as libellous was published with good motives and for justifiable ends.

The constitutions of several of the United States have made special provision in favor of giving the truth in evidence in public prosecutions for libels. In the constitutions of Pennsylvania, Delaware, Tennessee, Kentucky, Ohio, Indiana,
* and Illinois, it is declared, that in prosecutions for libels * 22
on men in respect to their public official conduct, the truth may be given in evidence, when the matter published was proper for public information. (*a*) In the constitutions of Mississippi and Missouri, the extension of the right to give the truth in evidence is more at large, and applies to all prosecutions or indictments for libels, without any qualifications annexed in restraint of the privilege; and an act of the legislature of New Jersey, in 1799, allowed the same unrestricted privilege. The legislature of Pennsylvania, in 1809, (*b*) went far beyond their own constitution, and declared by statute, that no person should be indictable for a publication on the official conduct of men in public trust; and that in all actions or criminal prosecutions for libel, the defendant might plead the truth in justification, or give it in evidence. The decision of the Court of Errors of New York, in *Thorn* v. *Blanchard*, (*c*) carried the toleration of a libellous publication as a privileged communication to as great an extent as the Pennsylvania law; for it appeared to be the doctrine of a majority of the court, that where a person petitioned the council of appointment to remove a public officer for corruption in office, public policy would not permit the officer libelled to have any redress by private action, whether the charge was true or false, or

(*a*) In Tennessee, the truth is as much an absolute justification on indictment as in actions for libels. Statute, 1805, ch. 6.

(*b*) Commonwealth *v.* Duane, 1 Binney, 601.

(*c*) 5 Johns. 508.

the motives of the petitioner innocent or malicious. The English law on this point seems to be founded in a juster policy. Petitions to the king, or to parliament, or to the secretary at war, for the redress of any grievance, are privileged communications, and not actionable libels, provided the petition be made in good faith, and the privilege be not abused; but if it appear that the communication was made maliciously, and without probable cause, the pretence under which it is made aggravates the case, and an action lies. (*d*)[1] The constitution of New York, as amended in

(*d*) Fairman *v.* Ives, 5 B. & Ald. 642; Best J.; Woodward *v.* Lander, 6 Carr. & Pa. 548. All communications made in the discharge of duty, public or private, legal or moral, are in England, if made honestly and without malice, protected; as, for instance, in speaking or writing respecting candidates for office, or giving answers to confidential inquiries, or fair criticism on the productions of an author. Duncombe *v.* Daniell, 8 Carr. & Pa. 222; Warr *v.* Jolly, 6 Id. 497; Harwood *v.* Astley, 1 Bos. & Pull. 47; Starkie on Slander, vol. i. Prel. discourse, 83, 84; vol. i. 262–267; Sir John Carr *v.* Hood, 1 Camp. N. P. 354, n.; Soane *v.* Knight, 1 Moody and Malk. 74; Starkie, *ut sup.* pp. 269–288–290, Amer. edit. Privileged communications are those made by counsel and others in the regular course of justice; but, to be protected, they must be pertinent and material to the matter in controversy. Gilbert *v.* The People, 1 Denio, 41. There have been contradictory decisions in America on the subject of privileged communications; but the case of Mayrant *v.* Richardson, 1 Nott & M'Cord, 347; Commonwealth *v.* Clapp, 4 Mass. 163; O'Donaghue *v.* McGovern, 23 Wendell, 26; and the State *v.* Burnham, 9 N. Hamp. 34, are in conformity with the English rule, and this is the better and more authoritative American doctrine.[2] See Starkie on Slander and Libel, vol. i. 172 and 219, Amer. edit. 1843, note by Mr. Wendell. As

[1] Privileged communications are of two kinds. The first is where the privilege is absolute; e. g. the publication of words used in legislative and judicial proceedings; the other is where the presumption of privilege arises, and the defendant is only liable, on affirmative proof of malice. Of this sort are private communications made under some relations of duty or privilege of confidence. Thorn *v.* Blanchard, 5 Johns. 508; Howard *v.* Thompson, 21 Wendell, 319. By statute in New York (Laws of 1854, ch. 130) no reporter, editor, or proprieter of a newspaper is liable for a fair and just report of any legislative, judicial, or other official proceeding, or of any speech or debate in the course of the same. But the publication of a slanderous statement uttered by a murderer at the time of his execution is not privileged by this statute or at the common law. Sanford *v.* Bennett, 24 N. Y. 20. See further as to privileged communications, Garr *v.* Selden, 4 Comst. 91; Gilbert *v.* People, 1 Denio, 41; Thomas *v.* Croswell, 7 Johns. 264; Cook *v.* Hill, 3 Sandf. 341; Van Wyck *v.* Aspinwall, 17 N. Y. 190; Hunt *v.* Bennett, 19 N. Y. 173; O'Donahue *v.* McGovern, 23 Wend. 26; Vanderzel *v.* McGregor, 12 Wendell, 545; Warner *v.* Paine, 2 Sandf. 195; Snydam *v.* Moffatt, 1 Id. 459; Hosmer *v.* Loveland, 19 Barb. (N. Y.) 111; Lewis *v.* Chapman, 16 N. Y. 369; Cincinnati Gazette Co. *v.* Timberlake, 10 Ohio St. 548. A counsellor at law is liable for defamatory words uttered at the trial of a cause if they are irrelevant to the issue, or are spoken maliciously. Ring *v.* Wheeler, 7 Cowen, 725.

[2] Van Wyck *v.* Guthrie, 4 Duer (N. Y.) 268; Revis *v.* Smith, 36 Eng. Law. & Eq. 268.

1821, is a little varied in its language * from those pro- *23
visons which have been mentioned, and is not quite so latitudinary in its indulgence as some of them. It declares, that "in all prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libellous is true, and was published with good motives and for justifiable ends, the party shall be acquitted."[1] These provisions in favor of giving the truth in evidence are to be found only in those constitutions which have been promulgated long since our Revolution; and the current of opinion seems to have been setting strongly, not only in favor of erecting barriers against any previous restraints upon publications, (and which was all that the earlier sages of the Revolution had in view,) but in favor of the policy that would diminish or destroy altogether every obstacle or responsibility in the way of the publication of the truth. The subject is not without its difficulties, and it has been found embarrassing to preserve equally, and in just harmony and proportion, the protection which is due to character, and the protection which ought to be afforded to liberty of speech and of the press. These rights are frequently brought into dangerous collision, and the tendency of measures in this country has been to relax too far the vigilance with which the common law surrounded and guarded character, while we are animated with a generous anxiety to maintain freedom of discussion. The constitution of New York makes the facts in every possible case a necessary subject of open investigation; and however improper or unfit those facts may be for public information, and however painful or injurious to the individuals concerned, yet it would seem that they may, in the first instance, be laid bare before the jury. The facts are to go to them, at all events; for the jury are to determine, *as it shall appear to them*, whether the motives of the libeller were good, and his end justifiable.

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to the question of probable cause on indictments for a malicious prosecution, it was settled in the Exchequer Chamber in England, on error from the Q. B., that it was the province of the jury to decide on the existence of facts, and for the court to determine whether the facts, if proved, constituted probable cause. Panton *v.* Williams, 2 Adol. & Ell. (N. S.) 169.

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[1] The same provision, *in hæc verba*, is embodied in the constitution of New York, adopted in 1846, except that the word criminal is inserted, so as to make it read "in all *criminal* prosecutions."

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The act of Congress of the 14th of July, 1798, made it
*24 an * indictable offence to libel the Government, or Congress, or the President of the United States; and made it lawful for the defendant, upon the trial, to give in evidence in his defence the truth of the matter contained in the publication charged as a libel. This act was, by the terms of it, *declaratory*, and was intended to convey the sense of Congress, that in prosecutions of that kind it was the common right of the defendant to give the truth in evidence. So the case of *The People* v. *Croswell*, in New York, was followed by an act of the legislature, on the 6th of April, 1805, enacting and *declaring*, that in every prosecution for a libel, (and which included public and private prosecutions,) it should be lawful for the defendant to give in evidence in his defence the truth of the matter charged; but such evidence was not to be a justification, unless, on the trial, it should be made satisfactorily to appear that the matter charged as libellous was published with good motives and for justifiable ends, and this was the whole extent of the doctrine which had been claimed in favor of the press in the case of *The People* v. *Croswell*.

There appears to have been some contrariety of opinion in the English books on this point, whether a defendant in a private action upon a libel could be permitted to justify the charge by pleading the truth. But the prevailing and the better opinion is, that the truth may, in all cases, be pleaded by way of justification, in a private action for damages, arising from written or printed defamation, as well as in an action for slanderous words. (*a*)

(*a*) Holt C. J., 11 Mod. 99; 3 Blacks. Com. 125; Buller N. P. 8; J'Anson *v.* Stewart, 1 Term Rep. 748; 1 Starkie on Slander and Libel, Wendell's edit. 1842, p. 210, note. In Massachusetts, a statute passed in March, 1827, not only allows the truth to be pleaded by way of justification in all actions for libels, as well as for oral slander, but every inference to be drawn from such a plea in admission of the fact of publication, or of malice, if the plea be not proved, is destroyed. The statute affords facility and encouragement to the plea. This statute is said to have been passed in consequence of a decision of the Supreme Court of Massachusetts, in the case of Jackson *v.* Stetson and wife, 15 Mass. 48, that a plea of *justification*, accompanying the *general issue*, was proof of the speaking of the words, and that if the defendant failed to establish it by proof, the plea was evidence of malice. The statute has been said to be only declaratory of the common-law rule, and it is undoubtedly just and true, that a failure to prove the plea of justification will not deprive the defendant of the right of adducing such evidence in mitigation of damages under the general issue as would have been admissible if a plea of justification had not accompanied it. Starkie on Slander and Libel, vol. i. Amer. edit. 1843. Int. by Wendell, pp. 49–55. Putting a plea in justification of a charge, and failing, is evidence of mal-

The ground of the private action is the injury which the party has sustained, and his consequent * right to damages * 25
as a recompense for that injury; but if the charge, in its substance and measure, be true in point of fact, the law considers the plaintiff as coming into court without any equitable title to relief. And yet it is easy to be perceived, that in the case of libels upon private character, greater strictness as to allowing the truth in evidence, by way of justification, ought to be observed than in the case of public prosecutions; for the public have no interest in the detail of private vices and defects, when the individual charged is not a candidate for any public trust; and publications of that kind are apt to be infected with malice, and to be very injurious to the peace and happiness of families. If the libel was made in order to expose to the public eye personal defects, or misfortunes, or vices, the proof of the truth of the charge would rather aggravate than lessen the baseness and evil tendency of the publication; and there is much justice and sound policy in the opinion, that in private as well as public prosecutions for libels, the inquiry should be pointed to the innocence or malice of the publisher's intentions. The truth ought to be admissible in evidence to explain that intent, and not in every instance to justify it. (*a*) The guilt and the essential ground of action for defamation consists in the malicious intention; and when the mind is not in fault, no prosecution can be sustained. (*b*) On the other *hand, * 26
the truth may be printed and published maliciously, and with an evil intent, and for no good purpose, and when it would be productive only of private misery, and public scandal and disgrace. (*a*)

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ice and aggravation of damages. Warwick *v.* Foulkes, 12 Mees. & W. 507; Matson *v.* Buck, 5 Cowen, 499.

(*a*) Vinnius in Inst. 4, 4, 1; Edin. Review, vol. xxvii. pp. 102, 142, vol. xxxvii. p. 207.

(*b*) We have a remarkable illustration of this principle in a decision cited by Lord Coke, when at the bar, and arguing the case of Brook *v.* Montague, (Cro. Jac. 91.) A preacher, in his sermon, recited a story out of Fox's Martyrology, of one Greenwood, as being a very wicked man and a persecutor, who died under signal visitations of God's displeasure. The preacher intended to show, by that example, the judgment of Providence upon great sinners; but he was totally mistaken as to the fact, for Greenwood was not dead nor diseased, but present at the preaching of the sermon. He brought his action for the defamation; and the court instructed the jury, that the defendant, having read and delivered the words as a matter of history, and without any evil intention, was not liable in damages.

(*a*) Though the plaintiff, in an action for a libel, makes the usual but unnecessary

(3.) *Of personal liberty and security.*

1. Writ of *habeas corpus*. The right of personal liberty is another absolute right of individuals, which has long been a favorite object of the English law. It is not only a constitutional principle, as we have already seen, that no person shall be deprived of his liberty without due process of law, but effectual provision is made against the continuance of all unlawful restraint or imprisonment, by the security of the privilege of the writ of *habeas corpus*.[1]

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averment in the declaration, of his general good credit and character, the defendant cannot go into proof of his general bad character, by way of mitigation of damages, or in support of averments in his plea to that effect. Nor can the plaintiff, in order to rebut the defence, go into evidence of his general good character, when the same is not impeached. Cornwall *v.* Richardson, Ryan & Moody, 305; Stow *v.* Converse, 3 Conn. 326; Matthews *v.* Huntley, 9 N. Hamp. 146. A plaintiff cannot be expected, and ought not to be required, to go into proof of so general a nature, and his good character is always presumed in law, unless by evidence of particular facts, fairly and specifically put in issue, that presumption be negatived. Baron Wood vindicated this rule with great energy and effect, in Jones *v.* Stevens, 11 Price, 235; and the case of the Earl of Leicester *v.* Walter, 2 Campb. N. P. 251, was overruled by the Court of Exchequer.

In England, the defendant in an action of slander may give in evidence, under the general issue, any defence except that which amounts to a justification of the charge, as, for instance, the truth of it, and the statute of limitations. Introduction, pp. 26, 27, to 1 Starkie on Slander and Libel, and the notes to vol. i. pp. 402 to 406, by Mr. Wendell, the learned editor of the American edition. The defence of privileged communications may be given in evidence, and need not be specially pleaded when it goes to show no malice, and the question of malice is a question of fact for a jury. Lillie *v.* Price, 5 Adol. & Ell. 645. The facts ought not to be specially pleaded in bar as a justification, when they do not amount to it on the face of the plea; for whether the libel was with or without malice cannot appear in the pleadings, and is matter for a jury. Turrill *v.* Dolloway, 17 Wendell, 426; S. C. 26 Id. 383. See 1 Starkie, Int. pp. 27–35, 38–49. The cases of Cooper *v.* Barber, 24 Wendell, 105, and Cooper *v.* Weed and others, cited by Mr. Wendell, in his interesting Introduction to his edition of Starkie, I apprehend were not correctly decided, so far as evidence of the matters contained in the notice annexed to the pleas was not permitted to go to the jury, to explain, mitigate, and repel the inference of malice. The observations of Mr. Wendell on those cases appear to be well founded, and, unless the jury are permitted to take cognizance of the question of malice, and of all the circumstances attending the publication, grievous injustice may be inflicted upon a defendant.

In 1843 the statute of 6 and 7 Vic. c. 96, was passed for the amendment of the law of defamation and libel. It provided that in actions for defamation, the truth of the matters charged should not be a defence, unless it were proved; also, that the publication was for the public benefit, and that the defendant might give his apology in evidence in mitigation of damages.

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[1] As to the writ of *habeas corpus* to determine the custody of infant children, and the practice under the writ, see Mercein *v.* The People, 25 Wendell, 64; People *v.* Mercein, 3 Hill, 399; The People *v.* —— 19 Wendell, 16; People *v.* Chegaray, 18 Id. 637; People *v.* Humphrey, 24 Barb. (N. Y.) 521.

Every restraint upon a man's liberty is, in the eye of the law, an imprisonment, wherever may be the place or whatever may be the manner in which the restraint is effected. (*b*) Whenever any person is detained with or without due process of law, unless for treason or felony, plainly and specially expressed in the warrant of commitment, or unless such person be a convict, or legally charged in execution, he is entitled to his writ of *habeas corpus*. It is a writ of right, which every person is entitled to, *ex merito justiciæ*; (*c*) but the benefit of it was, in a great degree, eluded in England, prior to the statute of Charles II., as the judges only awarded it in term time, and they assumed a discretionary power of awarding or refusing it. (*d*)[2] The explicit and peremptory * provisions of the statute of 31 Charles II. c. 2, re- *27
stored the writ of *habeas corpus* to all the efficacy to which it was entitled at common law, and which was requisite for the due protection of the liberty of the subject. That statute has been re-enacted or adopted, if not in terms, yet in substance and effect, in all the United States. (*a*) The privilege of this writ is also made

(*b*) 2 Inst. 589. Words may constitute an imprisonment, if they impose a restraint upon the person, and he be accordingly restrained and submits. Homer *v.* Battyn, Buller N. P. 62; Pike *v.* Hanson, 9 N. Hamp. 491.

(*c*) 4 Inst. 290.

(*d*) 3 Bulst. 27. The writ of *habeas corpus* had been in England, from the time of Magna Charta, a matter of right, but generally and fatally disregarded in cases relating to the government. The illegal and arbitrary imprisonments by the privy council and crown officers under Elizabeth gave rise to an impressive address from the common-law judges, in 1591, to Chancellor Hatton and Lord Burleigh, complaining of them in just and manly terms. Anderson's Rep. vol. i. p. 297. Mr. Hallam, in his Constitutional History of England, vol. i. pp. 317–320, gives, from an original manuscript in the British Museum, a more full and correct copy of this remarkable document, so honorable to the judges of the common-law courts. But afterwards, in 1627, when certain knights were imprisoned by the special command of the king, for not yielding to the forced loan, the Court of K. B. refused to bail or discharge them upon *habeas corpus*, though no cause, other than the king's command, was returned.

(*a*) See, for instance, the *Habeas Corpus* Act in Massachusetts of 16th March, 1785, and Massachusetts Revised Statutes, 1836, part 3, tit. 4, ch. 111; the *Habeas Corpus* Act of South Carolina of 1712, and referred to in 2 Bay, 563, and 2 S. C. Rep. p. 698; the *Habeas Corpus* Act of North Carolina, R. S. 1837, vol. i. p. 314; the *Habeas Corpus* Act of Pennsylvania of 18th Feb. 1785, and referred to in 1 Binney, 374; the *Habeas*

[2] The writ of *habeas corpus* is not so far a writ of right that the court may not refuse to issue it, when it appears, upon the face of the petition, that the party detained will not be entitled to a discharge, if brought before the court. Sims's case, 7 Cush. 285; Passmore Williamson's case, 26 Penn. 1.

an express constitutional right at all times, except in cases of invasion or rebellion, by the constitution of the United States, and by the constitutions of most of the states in the Union. The citizens are declared, in some of these constitutions, to be entitled to enjoy the privilege of this writ in the most "free, easy, cheap, expeditious, and ample manner"; and the right is equally perfect in those states where such a declaration is wanting. The right of deliverance from all unlawful imprisonment, to the full extent of the remedy provided by the *Habeas Corpus* Act, is a common-law right; and it is undoubtedly true, as has been already observed, (*b*) that the common law of England, so far as it was applicable to our circumstances, was brought over by our ancestors, upon their emigration to this country. The Revolution did not involve in it any abolition of the common law. It was rather calculated to strengthen and invigorate all the just principles of that law, suitable to our state of society and jurisprudence. It has been
* 28 adopted or declared in force by * the constitutions of some of the states, (*a*) and by statute in others; (*b*) and where it has not been so explicitly adopted, it is nevertheless to be considered as the law of the land, subject to the modifications which have been suggested, and to express legislative repeal. (*c*) We shall, accordingly, in the course of these lectures, take it for granted that the common law of England, applicable to our situation, and governments, is the law of this country, in all cases in which it has not been altered or rejected by statute, or varied by local usages, under the sanction of judicial decisions.

The substance of the provisions on the subject of the writ of *habeas corpus* may be found in the statute of 31 Charles II. c. 2, which is the basis of all the American statutes on the subject. The statute of New York, of 1787, was a literal transcript of the

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Corpus Act of New York of 1787, and 1801; the *Habeas Corpus* Act of New Jersey of 1795; the *Habeas Corpus* Act of Ohio, Statute Law of Ohio, 1831, and of Connecticut, Revised Statutes of Connecticut, 1821, and Statutes of Connecticut, 1838 p. 336; Ordinance of Congress of July 13, 1787, for the government of the territory of the United States northwest of the river Ohio; Territorial Act of Michigan, of April 12, 1827; the *Habeas Corpus* Act of Indiana, 1838; the *Habeas Corpus* Act of Arkansas, R. Statutes, p. 434.

(*b*) See vol. i. p. 342.

(*a*) Constitutions of New York, New Jersey, and Ohio.

(*b*) Pennsylvania and Virginia. See, also, *supra*, vol. i. 472.

(*c*) 2 N. Hamp. 44; Marshall C. J., in Livingston *v.* Jefferson, 4 Hall L. J. 78.

English statute, and the *Habeas Corpus* Act, in the subsequent revisions of the New York statute code, in 1801 and 1813, was essentially the same. But the New York statute of 1818, (*d*) enlarged the extent of the application of the writ, and this has been the case also in Pennsylvania. (*e*) It gave to the officer, before whom the writ was returned, authority to revise the cause of commitment, and to examine into the truth of the facts alleged in the return. The English statute of 56 Geo. III. c. 100, conferred the like power. By the New York Revised Statutes, which went into operation on 1st January, 1830, all the statute provisions on the subject of the writ of *habeas corpus* were redigested, and some material amendments, and more specific directions added. Instead of referring to the English statute of Charles II., we will take notice of the substance of the revised statute * of New * 29 York, and which, no doubt, contains equally the substance of the statute provisions on the subject in every state of the Union, (for they are all taken from the same source,) with the remedy and the sanctions somewhat extended.[1]

All persons restrained of their liberty, under any pretence whatsoever, are entitled to prosecute the writ, unless they be persons detained: (1.) By process from any court or judge of the United States having exclusive jurisdiction in the case.[2] (2.) Or by final judgment or decree, or execution thereon, of any competent tribunal of civil or criminal jurisdiction, other than in the case of a commitment for any alleged contempt. (*a*) The application for the writ must be to the Supreme Court, or chancellor, or a judge of the court, or other officer having the powers of a judge at chambers; and it must be by petition in writing, signed by or on behalf of the party; and it must state the grounds of the application, and the fact must be sworn to. (*b*)[3] The English statute did not

(*d*) Sess. 41, ch. 277.
(*e*) 1 Binney, 376.
(*a*) New York Revised Statutes, vol. ii. p. 563, sec. 21, 22.
(*b*) Ibid. sec. 23, 25.

[1] The different character of the writs of *habeas corpus* at common law, and by statute, is examined in The People *v.* Rose Porter, 1 Duer (N. Y.) 709.

[2] The state courts have jurisdiction concurrent with the federal courts, of a writ of *habeas corpus* for the body of a minor enlisted in the army. Commonwealth *v.* Fox, 7 Barr, 336.

[3] Under the Revised Statutes of New York, authority to entertain proceedings in

require the petition to be verified by the oath of the applicant. The penalty of $1,000 is given in favor of the party aggrieved, against every officer, and every member of the court assenting to the refusal, if any court or officer authorized to grant the writ shall refuse it when legally applied for. (*c*) The penalty for refusal to grant the writ was, by the English statute, confined to the default of the chancellor or judge *in vacation time;* whereas the penalty and suit for refusal to grant the writ applies, under the New York statute, to the judges of the Supreme Court, sitting in court, *in term time.* This is the first instance, in the history of the English law, that the judges of the highest common-law tribunal, sitting and acting, not in a ministerial but in a judicial capacity, are made responsible, in actions by private suitors,
* 30 for the exercise of their discretion, according to * their judgment in term time. (*a*) If the person to whom the writ is

(*c*) Ibid. sec. 31. The *Habeas Corpus* Act in Illinois confines the liability of the judge to a penalty for refusing to issue a writ of *habeas corpus* when legally applied for, to a "corrupt refusal." Revised Laws of Illinois, edit. 1833, p. 327. The statute law of Connecticut is silent as to any penalty upon any court or judge who does not grant the writ. It only declares it to be *the duty* of the court or chief justice, on due application and affidavits, to allow the writ. Statutes of Connecticut, 1838, p. 336. The *Habeas Corpus* Act of Virginia and of North Carolina is a transcript of the English statute, and confines the remedy for a refusal by the judge of the writ *in vacation time,* to an action by the party aggrieved. R. C. of Virginia, p. 328; N. C. R. S. vol. i. 315. So does the statute of New Jersey of 1847, p. 290. The *Habeas Corpus* Act of Mississippi makes the refusal or neglect of any judge or judges to grant the writ a high misdemeanor and an impeachable offence. R. C. of Mississippi, 1824, p. 224. The Revised System, reported by Mr. Pray, reduces the penal part of this provision to a penalty of $1,000 to the party aggrieved, but it makes *the court* or every judge thereof assenting liable to it. So the R. L. of Missouri, 1835, p. 307, applies the penalty to any court or magistrate refusing the writ. The granting of a writ of *habeas corpus* is not a matter of course in Texas. The court, to which application is made, must have "probable cause to believe" that the party applying for the writ "is detained in custody without lawful authority." Jordan *v.* State, 14 Texas, 436.

(*a*) See Yates *v.* Lansing, 5 Johns. 282; 6 Ibid. 387, S. C., where the principle of the English law on this subject is considered and recognized. The Massachusetts *Habeas Corpus* Act, in their Revised Statutes of 1835, does not contain degrading penalties hanging over the courts and judges. It does not presume that they will, in such particular cases, more than in any other, be wanting in their duty.

habeas corpus, in the case of a wife separated from her husband, applying for the custody of her minor child, is vested in the Supreme Court only, and a single judge of the court, or a county judge, has no jurisdiction. People *v.* Humphrey, 24 Barb. (N. Y.) 521.

directed, or on whom it is served, shall not promptly obey the writ, by making a full and explicit return, and shall fail to produce the party without a sufficient excuse, he is liable to be forthwith attached and committed, by the person granting the writ, to close custody, until he shall have obeyed the writ. (*b*) The former statute, instead of this summary remedy, gave a penalty to the party aggrieved, recoverable by suit. The party suing out the writ is to be remanded, if detained: (1.) By process from any court of the United States having exclusive jurisdiction. (2.) Or by virtue of a final decree, or judgment, or process thereon, of any competent court of civil or criminal jurisdiction. (3.) Or for any contempt specially and plainly charged, by some court or person having authority to commit on such a charge, and when the time for which the party may be legally detained has not expired. (*c*) If the party be in custody by civil process from a competent power, he may be discharged when the jurisdiction has been exceeded, or the party has become entitled to his discharge, or the process was unduly issued, or was not legally authorized. But no inquiry is to be made into the legality of any process, judgment, or decree, or the justice or propriety of the commitment in the case of persons detained under process of the United States, where the court or officer has exclusive jurisdiction; nor where the party is detained under the final decree or judgment of a competent court; nor where the commitment, made by any court, officer, or body, according to law, is for a contempt, and duly charged. The remedy, if the case admits of one, is by *certiorari*, or writ of error. (*d*) The

(*b*) New York Revised Statutes, vol. ii. p. 566, sec. 34.

(*c*) Ibid. 567, sec. 40.

(*d*) Ibid. 568, sec. 41; The People *v.* Cassels, 5 Hill (N. Y.) 164. In the case of The Commonwealth *v.* Keeper of Debtor's Apartment, 1 Ash. (Penn.) 10, it was declared not to be competent, upon *habeas corpus*, to inquire into the regularity of the proceedings of another competent court, nor for a single judge to revise the judgment of any other court. The opinion of the Supreme Court of New York, in the case of J. V. N. Yates, 4 Johns. 317, was to the same effect, and that opinion is supported by the Chief Justice of Pennsylvania, in the case of the Commonwealth *v.* Lecky, 1 Watts, 68;[1] N. Y. Revised Statutes, vol. ii. p. 568, sec. 42. If it appears plainly, on

[1] It has been held that the court cannot look beyond the colorable authority of the judge who issued the warrant; and if it be found that that officer had jurisdiction of the process, and took proof which he deemed to be sufficient, his judgment cannot be reviewed. The writ of *habeas corpus* is not in its nature a writ of error or review.

In the matter of Prime, 1 Barb. (N. Y.) 340; Bennac *v.* The People, 4 Barb. (N. Y.)

court or officer awarding the writ may, in other cases, ex-
*31 amine into *the merits of the commitment, and hear the allegations and proof arising thereon in a summary way, and dispose of the party as justice may require. (*a*) A person discharged upon *habeas corpus* is not to be reimprisoned for the same cause; but it is not to be deemed the same cause if he be afterwards committed for the same cause by the legal order of the court in which he was bound to appear, or in which he may be indicted and convicted; or if the discharge was for defect of proof, or defect in the commitment in a criminal case, and he be again arrested on sufficient proof and legal process; or if in a civil case, or discharge on mesne process, he be arrested on execution, or on mesne process in another suit, after the first suit is discontinued. (*b*) And finally, if any person solely, or as a member of any court, or in execution of any order, knowingly reimprisons such party, he forfeits a penalty of $1,250 to the party aggrieved, and is to be deemed guilty of a misdemeanor, and liable to fine and imprisonment. (*c*) This last provision is distinguished from that in any former statute on the subject, by applying the penal sanc-

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the return of the writ of *habeas corpus*, that the prisoner stands committed for a contempt adjudged against him by the British House of Commons, or by any tribunal or court of competent jurisdiction, the party awarding the writ, or before whom it is brought, cannot judge of the contempt, or bail the prisoner, but must immediately remand him. The adjudication is a conviction, and the commitment an execution. Murray's case, 1 Wils. 299; Crosby's case, 3 Wils. 188; Hobhouse's case, 3 B. & Ald. 420.[1]

(*a*) Ibid. sec. 43–48. The Massachusetts and Connecticut Revised Statutes give the like power of examination and trial on the return of the writ of *habeas corpus*. Massachusetts Revised Statutes, 1835, part 3, tit. 4, ch. 111; Revised Statutes of Connecticut, 1821, p. 264, and of 1838, p. 337.

(*b*) N. Y. Revised Statutes, vol. ii. 571, sec. 59.

(*c*) Ibid. 571, 572, sec. 60, 64.

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31. See the elaborate note, 3 Hill (N. Y.) 647, *et seq.* But the U. S. District Court held, In re Keeler, 1 Hemp. 306, that the writ of *habeas corpus* is in the nature of a writ of error, to test the legality of the commitment. A court before which the writ is pending, may go behind the warrant issued by a police justice, and inquire into the legality of the commitment. People *v.* Tompkins, 1 Parker C. R. 224; and see People *v.* Martin, Id. 187. If the magistrate's want of jurisdiction appear on the face of the proceedings, the prisoner will be discharged. Herrick *v.* Smith, 1 Gray, 1. See, also, People *v.* Sheriff, 29 Barb. (N. Y.) 622; People *v.* Spalding, 10 Paige, 28.

[1] A state court refused to issue a writ of *habeas corpus*, upon the petition of a party who had been committed for a contempt by the sentence of a court of the United States. Passmore Williamson's case, 26 Penn. 1. See, also, Williamson *v.* Lewis, 39 Penn. St. 9.

tion to the members of any court acting judicially, and by making the act of reimprisonment an indictable offence.

This is the substance of the efficacious remedy against the abuse of the right of personal liberty, afforded by the celebrated writ of *habeas corpus*. By the specific provisions which we have considered, the remedy for all unjust detention is distinctly marked; and even in cases of valid imprisonment, care is taken that it be not unreasonably or unnecessarily protracted. Persons confined upon any criminal charge, and who shall not have been indicted, are to be discharged within twenty-four hours after the discharge of a grand jury of the county, unless satisfactory cause be shown for the delay. (*d*) * And prisoners indicted are to be * 32 tried at the next court after such indictment found, or they will be entitled to be discharged, unless the trial was postponed at their instance, or satisfactory cause shown by the public prosecutor for delay. (*a*) If there be good reason to believe that a person illegally confined will be carried out of the state before he can be relieved by *habeas corpus*, the court or officer authorized to issue the writ may, by warrant, cause the prisoner and the party so detaining him to be forthwith brought up for examination, and be dealt with according to law. (*b*)

The *Habeas Corpus* Act has always been considered in England as a stable bulwark of civil liberty, and nothing similar to it can be found in any of the free commonwealths of antiquity. Its excellence consists in the easy, prompt, and efficient remedy afforded for all unlawful imprisonment, and personal liberty is not left to rest for its security upon general and abstract declarations of right.

In addition to the benefit of the writ of *habeas corpus*, which operates merely to *remove* all unlawful imprisonment, the party aggrieved is entitled to his private action of trespass to recover damages for the false imprisonment; and the party offending and

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(*d*) Ibid. p. 758, sec. 26.

(*a*) Ibid. 737, sec. 28, 29.

(*b*) Ibid. 572, sec. 65, 66, 67. The judges in England, in answer to a question propounded to them by the House of Lords, held that the writ of *habeas corpus* extended only to cases of imprisonment or restraint for criminal or supposed criminal matters. But in Lieutenant Randolph's case, before the Circuit Court of the United States in Virginia, in 1833, it was held that the writ lay in a case of civil process issuing from a special jurisdiction. Am. Jurist, No. 22, p. 338; 9 Peters U. S. 12, note, S. C.

acting without legal sanction is also liable to fine and imprisonment as for a misdemeanor.[1]

[1] In the case of the United States *v.* Booth, 21 How. U. S. 506, the right of a state judge or court to liberate, on *habeas corpus*, persons imprisoned under judicial process issued by federal authority, came under consideration in the Supreme Court of the United States; and the decision was, that an imprisonment under a warrant duly issued by a United States commissioner to arrest an offender against a federal statute, or under the judgment and sentence of a federal court having jurisdiction to try such offender, could not be inquired into before the state tribunals, although the constitutionality of the statute violated was in question, and although its assumed unconstitutionality was the ground of the proceeding in the state courts. This decision has been recently much quoted in political discussions as an authority for a very different proposition, to wit, that in no case can the state tribunals relieve against an arrest or imprisonment under *a statute* of the United States, or indeed under any authority which the United States government or any of its officers assumes to exercise. Obviously this is an unsound proposition. In the Booth case the imprisonment was lawful under judicial sentence or process, and quite irrespectively of the constitutionality of the statute which he had violated. The constitutionality of the statute was one of the very questions on which the innocence or guilt of the prisoner depended. The United States commissioner had undoubted authority to order his arrest for trial, and the federal court had exclusive jurisdiction to try him. The state court in discharging him on *habeas corpus*, because it deemed the statute to be unconstitutional in effect, undertook to withdraw from the federal court the very question of guilt which that court alone could rightfully try. But from the foundation of the government it has been the practice of state courts to pass upon the constitutionality of the laws of Congress whenever the question came before them in proper forms of litigation; and when their judgment is against the law, an appeal lies to the federal Supreme Court. This right of appeal preserves the harmony of federal and state jurisdictions. The writ of *habeas corpus* in the state courts brings up all questions on which the lawfulness or unlawfulness of the imprisonment depends; and if the authority for such imprisonment is merely *a statute* of the United States without judicial process, for example, a statute which commands A to take B, and hold him to military service, manifestly the statute can be questioned in all courts, state or federal, which have jurisdiction to redress wrongs against personal liberty, and in all forms in which that jurisdiction can be invoked. To an action in a state court for false imprisonment, a mere statute of Congress could not be pleaded as a justification, if the act could be shown to be unconstitutional and void. In such a case the state court not only may, but it must, pass upon that question, and certainly what would be bad as a plea to an action for false imprisonment would also be bad as a return to a *habeas corpus*. The distinction is between a judicial writ or proceeding and a mere legislative enactment. The former is a valid authority for an arrest, because in the course of the proceeding the constitutionality of the act can be examined and determined. The latter confers no authority if it be a nullity on constitutional grounds. Stated in a form perhaps still more elementary, the distinction is between a *lawful* and an *unlawful* imprisonment. An imprisonment is lawful under a writ issued or sentence pronounced by a magistrate or court having jurisdiction. It is unlawful if only a void law can be shown in justification. So it is unlawful although the statute be valid, if the person detained under it is not within its provisions, as in the case of minors enlisted into the military service of the United States, and it has never, unless very recently, been doubted that in such cases the state tribunals may on *habeas corpus* inquire into the legality of the detention. *Vide* Commonwealth *v.* Harrison, 11 Mass. 63; Same *v.* Cushing, Id. 67; Same *v.* Chandler, Id. 83.

2. Writ of *homine replegiando*. The New York Revised Statutes (*c*) provided for relief under the common-law writ *de homine replegiando*, in favor of fugitives from service in any other state. This writ is vexatious in its proceedings, and nearly obsolete, but it enabled the party suing out the writ to have an issue of fact tried by a jury. It is formally abolished by statute in Mississippi. (*d*) Though it was the only remedy at common law for unlawful imprisonment, Sergeant Maynard said (*e*) he found but one instance of it in the time of Edward I. It was formerly resorted to in Virginia, but the provision relating to it has been repealed. The New York provision on the subject has been held to be contrary to the constitution and laws of the United States, and void in respect to slaves being fugitives from labor from states where slavery is lawful; for the constitution and law of the United States contemplated a summary proceeding, and a surrender on claim made, and not the delay, expense, and vexation of a suit and jury-trial in the courts of the state to which the slave had fled. (*f*)

(*c*) Vol. ii. p. 561.

(*d*) R. C. of Mississippi, 1824, p. 224.

(*e*) King *v.* Lord Grey, 2 Show 218.

(*f*) Jack *v.* Martin, 12 Wendell, 311; S. C. 14 Wendell, 507. This case, when before the Court of Errors, went off on another point, but Ch. Walworth held that the act of the state *was valid*, and that the act of Congress of 1793, prescribing the summary manner of seizing and delivering up fugitives from labor in other states, was unconstitutional and void. The legislature of New York, by the subsequent act of May 6th, 1839, ch. 350, made an additional provision, declaring that *fugitives from justice from other states* may be arrested by warrant of a magistrate, and examined; and if it satisfactorily appears that the crime has been committed by the fugitive charged, the magistrate is to commit the fugitive to jail for a reasonable time, to enable the requisition for a surrender to be made. The magistrate may take bail that the fugitive will appear and surrender on the executive demand. If no application be made in a reasonable time, to be designated in the warrant or bail bond, the prisoner is to be dischaged. Notice of the arrest is to be immediately given to the government of the other state. If the general sessions of the peace be held in the intermediate time, they have jurisdiction given them over the whole subject.[2] Again, by act of May 6th, 1840, ch. 225, provision is made that the claim to the services of alleged *fugitives from service or labor in another state*, and their identity, and the fact of the escape shall, upon the return of the writ of *habeas corpus* duly issued to arrest the fugitive, be determined by jury on

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[2] It should appear before making the arrest, by a complaint in writing on oath, that a crime has been committed in the foreign state; that the accused has been charged in that state with the commission of such crime, and that he has fled from such state and is found here. In the matter of Heyward, 1 Sandf. (N. Y.) 701. See, also, 1 Parker, C. R. 429.

The Massachusetts Statutes, (*g*) in 1835, made special provision for the writ, and gave it whenever any person was restrained of his liberty, or held in duress, unless by virtue of some lawful process issued by competent authority; and if it should appear, by the return of the writ, that the defendant eloigned the plaintiff's body, the latter was to be entitled to a writ of *capias in withernam* to take the defendant's body. (*h*)

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summary process. See Constitution U. S. art. 4, sec. 2, No. 3; Act of Congress, Feb. 12th, 1793, ch. 7.[8]

(*g*) Part 3, tit. 4, c. 111. The provision was so reported by the commissioners for the revision of the statute law of Massachusetts, but it was eventually struck out, and the writ *de homine replegiando* abolished. Revised Statutes of Massachusetts sec. 38.

(*h*) The commissioners admitted that the writ of *habeas corpus* furnished so complete and effectual a remedy for all cases of unlawful imprisonment, that the other writ was seldom used. They thought, however, that it might be convenient and even necessary, when a person was seized without legal process, as an apprentice or servant, or as held to labor or service in another state, or as the principal for whom another is bail. This writ of personal replevin enabled the person under restraint to try his right to immediate personal liberty before a jury, by presenting an issue in fact, and which the remedy under the writ of *habeas corpus* does not; and the legislature of Massachusetts, in 1837, revived in substance the provisions of the writ *de homine replegiando*, in a bill "to restore the trial by jury on questions of personal freedom." See on S. P. vol. i. 404. The legislature of Indiana, in 1824, and of Vermont and New Jersey, in 1837, and of Connecticut, in 1838, also provided the trial by jury, if either party demanded it, in the case of the claim of *fugitives from labor*. The doctrine in Jack *v.* Martin seems therefore to be borne down in the non-slaveholding states by the force of legislative authority. But the decision of the Supreme Court of the United States, March 1, 1842, in the case of Prigg *v.* The Commonwealth of Pennsylvania, 16 Peters U. S. 539, has restored and established the construction given to the act of Congress of 1793, in the case of Jack *v.* Martin. It declared that

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[8] It was held in Lemmon *v.* People, 26 Barb. (N. Y.) 270, that this provision of the constitution is confined to persons held to service or labor *escaping* from one state to another, and does not extend to the case of a person brought voluntarily by his master into another state; and that by a statute of New York, (Rev. Stat. part 1, c. 20, tit. 7,) slaves brought into New York from a slave state, solely for the purpose of there being put on board of a vessel to be carried to a slave state, become free immediately upon their arrival in New York. This case was affirmed by the Court of Appeals, 20 N. Y. 526, three judges out of eight dissenting. Clerke J., held the statute to be contrary to the constitution of the United States. Comstock and Selden JJ., without coming to any positive conclusion as to the constitutionality of the statute, held, that it was contrary to the principles of comity and justice, which ought to regulate intercourse between the several states. And in Sidney *v.* White, 1 Sneed (Tenn.) 91, it was held, that after the certificate of a United States judge, under the act of Congress of 1793, and delivery to the claimant, the state courts of the state, in which this summary process is instituted, have no jurisdiction to try the right of the alleged slave to freedom.

In England, the regular consequence of personal liberty is said to be, that every Englishman may claim a right to abide in his

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the act of Congress of 1793 was constitutional, and passed in pursuance of an express provision in the constitution of the United States; it excluded all state legislation on the same subject; and that no state had a right to modify it by its own legislation, or impede the execution of any law of Congress upon the subject of fugitive slaves. This decision renders void all statute regulations in the states on the subject. Several of the judges who were in the minority thought that the power of Congress was not so exclusive, but that state legislation might act *in aid* of the power to seize and recapture fugitive slaves. The decision in the case of Prigg *v.* The Commonwealth of Pennsylvania has unintentionally thrown much difficulty and hazard in the way of efforts by the owners in the slave states to reclaim in the free states their fugitive slaves. That decision went to silence and render inoperative and void all provisions and aid in the free states in respect to the recovery of such slaves. The state governments are not content to remain passive, and leave unembarrassed the free operation of the provision of the act of Congress. The Supreme Court of the United States in the case of Prigg admitted that state magistrates might, if they chose, and were not prohibited by state legislation, exercise the power of arrest given by the act of Congress, and in aid of it.[4] But such permission is withdrawn by state law in some of the states, and adjudged to be illegal. Thus, in Ohio, the act to prevent kidnapping, (Swan's Statutes, p. 600,) prohibited the arrest and carrying out of the state of fugitive slaves until they had been taken before a magistrate and proof of property exhibited. But the Supreme Court of that state, in Richardson *v.* Beebe, (Law Reporter for November, 1846,) held that the decisions in Prigg rendered null and void all state aid and legislation to interfere with the owner's right of caption in person or by his agent, and that the state act had become inoperative and null. So the decision in the Circuit Court in the city of New York, in the matter of George Kirk, (Law Reporter, No. 9, p. 361, for December, 1846,) was to the same effect, and it was adjudged that the Revised Statutes of New York, (N. Y. R. S., 5th ed., p. 921, sec. 10,) making provision on this subject in favor of the arrest and surrender of fugitive slaves concealed on board of a vessel without the knowledge of the captain, was unconstitutional and void. The court in Massachusetts, in the case of The Commonwealth *v.* Tracy, (5 Metcalf, 536,) held that the states might secure their peace by causing fugitive slaves to be arrested and removed from their borders for their own security, provided it was not the object or purpose of the state provision indirectly to aid the owner of the slaves in recovering them. The statute of Pennsylvania, in February, 1847, was more stringent in its opposition to all state aid and accommodation in the recovery of fugitive slaves. It is made highly penal for any state magistrate to take cognizance of the case of a fugitive slave, or grant any process or certificate in relation thereto. It is also made highly penal for any person claiming his fugitive slave to seize, or attempt to seize, or carry him away "in a violent, tumultuous, or unreasonable manner, so as to disturb or endanger the public peace"; and that it should be unlawful and highly penal for any jailer or keeper of a prison to use any jail or prison for the detention of such fugitive slaves. The judges are likewise authorized at all times to inquire, under a writ of *habeas corpus*, into the cause of the arrest or imprisonment of any human being. The act of 1780, allowing the owners of slaves to bring in and retain them within the state in involuntary servitude for a transient period, is repealed.

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[4] See Moore *v.* Illinois, 14 How. U. S. 13, where Prigg's case is explained by the court.

own country so long as he pleases, and is not to be driven from it, unless by the sentence of the law prescribing exportation or

There are provisions of a similar effect in some of the other free states, and they amount in their consequences almost to a repeal of the act of Congress of February, 1793, and of sec. 2 of art. 4 of the constitution of the United States, on which that act was founded. The owner of a fugitive slave would be apt to be deterred, under such discouraging and hazardous circumstances, from undertaking to reclaim his fugitive slaves. The spirit of these provisions appears to be rather repugnant to the principle of compromise and mutual and liberal concession which dictated the section in question, and indeed pervaded every part of the constitution of the United States.

With respect to *fugitives from justice* from one state to another, charged with "treason, felony, or other crime," the constitution of the United States (art. 4, sec. 2) provides that they shall, on demand of the executive authority of the state from which they fled,[5] be delivered up, to be removed to the state having jurisdiction of the crime. The act of Congress of 12th February, 1793, ch. 7, sec. 1, has made provision for the case, and declared that the demand shall be accompanied with a copy of the indictment found, or an affidavit made before a magistrate, charging the person with having committed "treason, felony, or other crime," and certified by the governor or chief magistrate to be authentic; and in that case it is declared to be the duty of the executive magistrate of the state to which the person has fled to cause the person to be arrested and secured, and notice thereof given, and the person then to be surrendered to the executive authority making the demand, or its agent. I am not aware that there has been any judicial opinion on this provision; and as it stands, I should apprehend that on the demand being made, and the documents exhibited, no discretion remained with the executive of the state to which the fugitive had fled, and that it was his duty to cause the fugitive to be arrested and surrendered. But if the executive on whom the requisition is made should think proper to exercise his discretion, and refuse to cause the fugitive to be arrested and surrendered, (as has been done in one or more instances,) I do not know of any power under the authority of the United States by which he could be coerced to perform the duty. Perhaps the act of Congress may be considered as prescribing a duty the performance of which cannot be enforced. The provision in the constitution of the United States is not, however, to be regarded as a null or void provision, or resting on the mere will and pleasure of the state authorities. It is a substantive and essential grant of power by the people of the United States to the government of the United States, and it partakes of a judicial character, and is fitly and constitutionally of judicial cognizance. The judicial power of the United States extends to all cases in law and equity arising under the constitution, and the courts and judges of the United States within the state to which the fugitive has fled are the fittest tribunals to be clothed with the exercise of this power, so that the claimant might, on due application, with the requisite proof, cause the fugitive to be arrested and removed, or surrendered by the marshal of the district, under regular judicial process, as by *habeas corpus*. To such a course of proceeding and to

[5] The Governor of Massachusetts, in the year 1856, refused to deliver an alleged fugitive from justice, upon the requisition of the Governor of Wisconsin, on the ground that he had not *fled* from that state within the meaning of the constitution, and that the papers must conclusively show the act of fleeing to have been committed. As to what constitutes a legal flight, see the papers in the case of Jonas Wyeth, on file in the office of the Secretary of State of Massachusetts.

banishment in the given case; or unless required abroad while in the military or naval service. Exportation for crimes rests entirely, in England, upon statute, for it was a punishment unknown to the common law. A statute under Elizabeth first inflicted banishment for offences. *Some of our *33 American constitutions (*a*) have declared, that no person shall be liable to be transported out of the state for any offence committed within it. It would not be consistent with the spirit of that provision to prescribe banishment as a part of the punishment, whatever foreign place or asylum might be deemed suitable for the reception of convicts. In most of the states, no such constitutional restriction is imposed upon the discretion of the

such a source of power, I should rather apprehend the act of Congress ought to have applied, and given facility and direction. Such a course of proceeding would be efficient and more safe for the fugitive, and more consistent with the orderly and customary administration of justice. It concerns the common interest and intercourse among the several states, and is a branch of international jurisprudence.[6]

(*a*) Constitutions of Vermont, Ohio, Illinois, and Mississippi.

[6] In *Ex parte* Smith, (the Mormon prophet,) before the Circuit Court of the U. S. for Ohio, Mr. Justice McLean, in an elaborate decision, lays down the following principles: —

1. The functions performed by the governors on the arrest of fugitives from justice are under the laws of the United States, and not of the particular state.

2. The U. S. Courts have jurisdiction on *habeas corpus*, after the fugitive has been arrested on requisition, and may look to the sufficiency of the affidavit.

3. The crime must be charged to have been committed: averments of mere belief are insufficient.

4. The fugitive must have been in the state where the crime was committed, and have fled therefrom; and no one can be delivered to be tried in another state, if he were a mere accessory, and in a different state from that in which the crime was committed.

Held, in *In re* Kaine, 14 How. U. S. 103, that a justice cannot arrest a fugitive until a demand is regularly made; and when thus made, the demand is conclusive; and the court on *habeas corpus* will not inquire into the offence charged. State *v.* Buzine, 4 Harr. 572; State *v.* Schlemn, 4 Harr. 577. It is held, *In re* Fetter, 3 Zabr. 311, that a fugitive from any state in the Union may be arrested and detained in another, though no requisition have then been made by the state where the offence was committed.

The act contemplates only the case of a fugitive who is at large. In the matter of Troutman, 4 Zabr. 634.

It was held in Nichols *v.* Cornelius, 7 Ind. 611, that it is unnecessary for the warrant issued by the executive magistrate of the state to which the fugitive has fled to be accompanied by a copy of the indictment found in the state from which he has fled, and that in that case the warrant sufficiently showed the authority to make an arrest, without producing any authority from the governor of the state from which the fugitive has fled.

legislature; and in New York the governor is authorized to pardon, upon such conditions as he may think proper. (*b*) Convicts have sometimes been pardoned under the condition of leaving the state in a given time, and not returning. This was equivalent, in its effect and operation, to a judicial sentence of exportation or banishment.

3. Writ of *ne exeat.* In England, the king, by the prerogative writ of *ne exeat*, may prohibit a subject from going abroad without license. But this prerogative is said to have been unknown to the common law, which, in the freedom of its spirit, allowed every man to depart the realm at his pleasure. The first invasion of this privilege was by the constitutions of Clarendon, in the reign of Henry II., (*c*) and they were understood to apply exclusively to the clergy, and prohibited them from leaving the kingdom without the king's license. In the Magna Charta of King John, every one was allowed to depart the kingdom, and return at his pleasure, except in time of war, and saving their faith due to the king. (*d*) But this provision was omitted in the charter of Henry III., and in the reign of Edward I. it began to be considered necessary to have the king's license to go abroad; and it became at last to be the settled doctrine, that no subject possessed the right of quitting the kingdom without the
* 34 king's license; and prerogative * writs which were in substance the same as the *ne exeat* became in use, requiring security of persons meditating a departure, that they should not leave the realm without the king's license. (*a*) By the statute of 13 Eliz. ch. 3, a subject departing the realm without license under the great seal forfeited his personal estate and the profits of his land. The prerogative of the crown, on this point, seems to be conceded; but until the king's proclamation, or a writ of *ne exeat* has actually issued, it is understood that any Englishman may go beyond sea.

This writ of *ne exeat* has, in modern times, been applied as a civil remedy in chancery, to prevent debtors escaping from their creditors. It amounts, in ordinary civil cases, to nothing more than process to hold to bail, or compel a party to give security

(*b*) New York Revised Statutes, vol. ii. p. 745, sec. 21.
(*c*) Beames on the Writ of Ne Exeat, p. 2.
(*d*) Blacks. ed. of Magna Charta of King John, art. 42.
(*a*) Beames's Ne Exeat, ch. 1.

to abide the decree. (*b*) In this view we have at present no concern with this writ; and in this country, the writ of *ne exeat* is not in use, except in chancery, for civil purposes between party and party. No citizen can be sent abroad, or, under the existing law of the land, prevented from going abroad, except in those cases in which he may be detained by civil process, or upon a criminal charge. The constitutions of several of the United States have declared, that all people have a natural right to emigrate from the state, and have prohibited the interruption of that right. (*c*) We shall, in the course of the next lecture, examine particularly into the foundation of this right of emigration, when carried to the extent of a perpetual renunciation of one's allegiance to the country of his birth.

4. The *free exercise and enjoyment of religious profession and worship* may be considered as one of the absolute rights of individuals, recognized in our American constitutions, and secured to them by law. Civil and religious *liberty generally go hand in hand, and the suppression of either of them, for any length of time, will terminate the existence of the other.[1] *35

It is ordained by the constitution of the United States, (*a*) that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, and the same principle appears in all the state constitutions. The principle is generally announced in them without any kind of qualification or

(*b*) In Indiana and Illinois this process may be granted on bail or petition, and issued on claims, whether due or not due, and whether they be legal or equitable, where one or more joint debtors or co-sureties is about to remove out of the state, with his effects, before the time of payment or conveyance. Revised Laws of Illinois, edit. 1833, and of Indiana, 1838. So the writ of *ne exeat* may be granted in Georgia, in certain cases, though the debt be not due. Prince's Dig. 2d edit. p. 440. In New York there must be a debt due and payable at the time, and it must be an equitable debt, which can be enforced against the person of the defendant. Gleason *v.* Bisby, 1 Clarke, 551.

(*c*) Constitutions of Vermont, Pennsylvania, Kentucky, Indiana, Mississippi, and Louisiana.

(*a*) Amendments, art. 1.

[1] Blasphemy, it seems, is an indictable offence, as tending to public disorder and a breach of the peace. 1 East P. C. 3; People *v.* Ruggles, 8 Johns. 160. Nevertheless, according to the best considered authorities, the Christian religion is not a part of the common law in this country. Vidall *v.* Girard's Executors, 2 How. U. S. 127; Andrew *v.* The Bible &c., Society, 4 Sandf. (N. Y.) 156; Ayers *v.* M. E. Church, Id. 351.

limitation annexed, and with the exclusion of every species of religious test. (*b*) The charter of Rhode Island, of 1663, established a freedom of religious opinion and worship with extraordinary liberality for that early period of New England history. It declared, that "no persons within the colony, at any time thereafter, should be in any wise molested, punished, disquieted, or called in question, for any differences in opinion in matters of religion, who do not actually disturb the civil peace of the colony." The principles and character of Roger Williams, the earliest settler and actual founder of the state of Rhode Island, in 1636, had prepared the way for such an unexampled declaration of the rights and sanctity of conscience. (*c*) The legislature of Mary-

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(*b*) I say *generally*, for in the constitutions of New Hampshire, Massachusetts, New Jersey, Maryland, North Carolina, Tennessee, and Mississippi, religious tests, to a certain extent, seem to have been retained. By the constitution of North Carolina of 1776, no person denying the divine authority of the Old or New Testament, or the truth of the Protestant religion, could hold a civil office. By the amended constitution of 1835, the word Protestant was omitted, and the word Christian substituted.

In Massachusetts, by an order of the general court, in 1631, no persons were to be admitted to the freedom of the commonwealth but such as were members of some of the churches within the same. Massachusetts Ancient Charters and Laws, Boston, 1814, p. 117. But this law was declared to be repealed in 1665. Id. See, also, in Connecticut, or rather in that part of it which, until 1665, constituted the separate New Haven Colony, the early settlers established, and enforced by law, a uniformity of religious doctrine and worship, and made it requisite that every person holding a civil office should be a church-member. Trumbull's Hist. of Connecticut, vol. i. 100, App. 535 – 537. The Blue Laws of New Haven Colony, commonly called the Blue Laws of Connecticut; by an Antiquarian; Hartford, Conn., 1838, p. 122, art. 16, pp. 127, 128, art. 23. In the former editions of this work I inadvertently applied the Blue Laws to Connecticut at large. This was incorrect; for until 1665 New Haven was a distinct colony from Connecticut; and to the New Haven Colony the Blue Laws *eo nomine*, as digested by Governor Eaton, were to be confined. The severity of such a religious establishment was afterwards relaxed, and by the constitution of Connecticut, 1818, perfect freedom of religious profession and worship, without discrimination, was ordained. And in the ordinance of Congress of July 13th, 1787, *for the government of the territory of the United States northwest of the river Ohio*, it was declared to be an article of compact between the original states and the people and states in the said territory — a fundamental principle, to remain forever unalterable — that no person, demeaning himself in a peaceable and orderly manner, should ever be molested on account of his mode of worship or religious sentiments.

(*c*) The covenant into which the first settlers of Providence, in Rhode Island, mutually entered, and which is supposed to have been drawn by Roger Williams, declared, "that they promised to be subject to all such orders or agreements as should be made for public good of the body, in an orderly way, by the major assent of the present inhabitants, *masters of families*, incorporated together into a town fellowship, and such *others whom they should admit into them*, ONLY IN CIVIL THINGS." (Address of

land had already, in 1649, declared by law, that no persons professing to believe in Jesus Christ should be molested in respect of their religion, or in the free exercise thereof, or be compelled to the belief or exercise of any other religion, against their consent. (*d*) Thus, to use the words of a learned and liberal historian, (*e*) the Catholic planters of Maryland procured to their adopted country the distinguished praise of being the first of the American states in which toleration was established by law; and while the Puritans were persecuting their Protestant brethren in New England, and the Episcopalians retorting the same severity on * the Puritans in Virginia, the Catholics, against * 36 whom the others were combined, formed in Maryland a sanctuary, where all might worship and none might oppress, and where even Protestants sought refuge from Protestant intolerance. The proprietaries of Carolina, for the better encouragement of settlers, declared, concurrently in point of time with the Rhode Island charter, that all persons settling therein should enjoy the most perfect freedom in religion. (*a*) So, also, Lord Berkeley and Sir George Carteret, the proprietaries of New Jersey, in their first *concessions* to the settlers, in 1664, of a charter of civil liberties, secured to them the full and perfect enjoyment of religious liberty, by adopting the same language as that used in the charter of Rhode Island. The fundamental constitutions of the twenty-four proprietaries in 1683 reiterated the right to the same unqualified freedom of religious profession and worship. In 1698, the declaratory act of the general assembly of East New Jersey was a little more restrictive in its operations. Religious liberty

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William G. Goddard, Esq., Newport, 1843.) In this original, but brief and admirable document, we see deeply laid the seminal principles of freedom of conscience, and of a provident and guarded democracy.

(*d*) Bacon's Laws, 1649, ch. 1. See also Chalmers's Political Annals, p. 219. This legislative act of Maryland in favor of religious toleration was prior in time to any in America, if not in any country, but it was still limited to Trinitarian Christians. Bancroft, in his History, vol. i. p. 276, gives a true copy of the law, as taken from Langford, pp. 27 – 32. Mr. Kennedy, in his Discourse before the Maryland Historical Society, in December, 1845, says, that the glory of Maryland toleration is not the act of 1649, but in the charter granted to George Calvert, the first Lord Baltimore, in 1632, and who, though a Catholic, was a distinguished friend to religious toleration.

(*e*) Grahame's History of the Rise and Progress of the United States.

(*a*) Chalmers's Annals, 517, 518. The charter of Charles II., of 30th June, 1667, to the proprietaries of Carolina, authorized them to grant religious liberty of conscience and practice to non-conformists, who did not thereby disturb the civil peace of the province. See the charter in R. S. of N. Carolina, vol. ii.

was confined to the Protestant professors of the Christian faith, and so was the religious toleration allowed by the Massachusetts charter of 1691, and by the declaratory act of the general assembly of New York in 1691, and by the charter of Georgia in 1732. (*b*) On the other hand, the concessions of the one hundred and fifty proprietors and planters of the province of West New Jersey, in 1676, established under the auspices of William Penn, went to the most large and liberal extent. It was declared in them, that no man on earth had power or authority to rule over men's consciences in religious matters, and that no person should be called in question, or punished, or hurt in person, estate, or privilege, for the sake of his opinion, judgment, or worship in the concernments of religion. (*c*) In the code of laws, or charter of privileges, prepared by William Penn for Pennsylvania, and adopted by the first provincial assembly, it was declared that no persons acknowledging a Deity, and living peaceably and justly in society, should be molested or prejudiced for
* 37 their religious * persuasion or practice in faith and worship, or be compelled to frequent or maintain any religious ministry or worship. (*a*) It appears from these illustrious exam-

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(*b*) Bradford's edition of the Laws of New York, 1719; Massachusetts Colony Laws, edit. 1814; 1 Holmes's Annals, 553. It appears, however, that by the charter of liberties established by the general assembly of the province of New York, under the Duke of York, in 1683, complete enjoyment of religious profession and worship was granted to all persons who "professed faith in God by Jesus Christ." This, of course, included Roman Catholics. It is to be observed, however, that the Duke of York (afterwards James II.) was himself a papist. The body of laws known as the *Duke's laws*, and digested and promulgated by a convention of deputies on Long Island, Feb. 1665, called by Governor Nicoll, the first governor of New York under the Duke of York, declared that no person should be molested for differing in judgment in matters of religion who professed Christianity. See an abstract of the code in Thompson's History of Long Island, vol. i. p. 132, edit. 1843.

(*c*) Smith's History of New Jersey, pp. 126, 270–274, App. Nos. 1 and 2; Leaming & Spicer's Coll. edit. Philad. 1757, pp. 12–26, 153–166, 368, 382–411. In 1693, the legislature of West New Jersey prescribed a confession of faith as a condition of holding office, and that confession contained the declaration of a belief in the doctrine of the Trinity, according to the English Toleration Act of 1689. Gordon's Hist. of New Jersey, 45.

(*a*) Proud's Hist. of Pennsylvania, vol. i. pp. 196, 206, 207, vol. ii. App. No. 2, p. 19, sec. 35. Charter of Privileges granted by William Penn, in 1701, and accepted by the general assembly, and inserted in the beginning of the volume of the Laws of Pennsylvania, edit. 1775. The Puritans of Massachusetts, under the charter of 1629, *assumed* the grant to them of the free exercise of a religion according to the dictates of conscience; but the better opinion is, that this was a gratuitous assumption not war-

ples that various portions of this country became, even in its infant state, distinguished asylums for the enjoyment of the principles of civil and religious liberty, by the persecuted votaries of those principles from every part of Europe.

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ranted by any sound construction of their charter; and while they claimed this right for themselves, and exercised it without any foundation in the grant, they forthwith denied to Episcopalians the privilege of using their own creed and worship. The two recent historians, Grahame and Bancroft, take different sides on this question, (if any question there can really be,) under the charter of 1629. The former in his History of the United States, (vol. i. pp. 244–247,) follows Neal and other Puritans of that age, in favor of the Puritans' claim; and the latter, in his History of the United States (vol. i. pp. 371, 372), follows Chalmers, Robertson, and Story, in opposition to it. The leading principle in the religious system of the colony of Massachusetts was the compulsory support of public worship, and the liability of every inhabitant to taxation for its support. Anabaptists and Quakers were first exempted, and next Episcopalians, who were allowed to pay their taxes to their own clergymen. The laws still in force contain the principle, that a religious establishment of the Christian Protestant religion and public worship ought to be maintained by legal coercion. Oakes *v.* Hill, 10 Pick. 333.

Some of the colonial governments provided for the enjoyment of *religious liberty* in the largest sense, as allowing every man the free exercise and enjoyment of religious profession and worship without discrimination; and this was the language of the constitution of New York, of 1777; and it is continued in the revised constitution of 1846; and the singularly argumentative preamble and statute of the assembly of Virginia, in 1786, carried the doctrine of religious freedom to the same extent. In other instances, *religious toleration* was granted, which meant the allowance of religious opinions and modes of worship differing from those established by law. The prevalent doctrine at the present day is in favor of religious liberty and equality, without the existence of any power of control, or distinction by law, or establishment. The Revised Constitution of New York, in 1846, seems to have set at liberty even the consciences of witnesses, for it declares that "No person shall be rendered incompetent to be a witness on account of his opinion on matters of religious belief."

APPENDIX.

CONSTITUTION OF THE UNITED STATES.

We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.

SECTION I.

Legislative powers.

1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION II.

House of Representatives; its members; by whom chosen.

1. The House of Representatives shall be composed of members chosen every second year by the people of the several states; and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

Qualification of representatives.

2. No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.

Representatives and taxes to be apportioned according to numbers.

3. Representatives and direct taxes shall be apportioned among the several states which may be included within this Union according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each state shall have at least one representative; and until such enumeration shall be made, the state of New Hampshire shall be entitled to choose three; Massachusetts, eight; Rhode Island and Providence Plantations, one; Connecticut, five; New York, six; New Jersey, four; Pennsylvania, eight; Dela-

Actual enumeration every ten years.

Limitation of the ratio of representation, &c.

First apportionment of representatives.

ware, one; Maryland, six; Virginia, ten; North Carolina, five; South Carolina, five; and Georgia, three.

Vacancies, how filled.

4. When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.

Powers of the House.

5. The House of Representatives shall choose their Speaker and other officers, and shall have the sole power of impeachment.

SECTION III.

Senators, how chosen.

1. The Senate of the United States shall be composed of two senators from each state, chosen by the legislature thereof, for six years; and each senator shall have one vote.

The Senate divided into three classes.

2. Immediately after they shall be assembled in consequence of the first election, they shall be divided, as equally as may be, into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one third may be chosen every second year; and if vacancies happen by resignation or otherwise, during the recess of the legislature of any state, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

When vacated and filled.

Vacancies.

Qualifications of senators.

3. No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state for which he shall be chosen.

President of the Senate.

4. The Vice-President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

Ib. and other officers.

5. The Senate shall choose their other officers, and also a President *pro tempore*, in the absence of the Vice-President, or when he shall exercise the office of President of the United States.

The sole power to try impeachments, in the Senate, &c.

6. The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside; and no person shall be convicted without the concurrence of two thirds of the members present.

Extent of judgment in cases of impeachment.

7. Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to law.

SECTION IV.

Elections for senators and representatives, how regulated.

1. The times, places, and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof; but the Congress may, at any time, by law, make or alter such regulations, except as to the places of choosing senators.

2. The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day. Meetings of Congress.

SECTION V.

1. Each house shall be the judge of the elections, returns, and qualifications of its own members; and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner and under such penalties as each house may provide. Each house judge of the election of its own members. Quorum.

2. Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member. To determine its own rules, &c.

3. Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either house on any question shall, at the desire of one fifth of those present, be entered on the journal. To keep and publish journals, &c.

4. Neither house, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting. Adjournment.

SECTION VI.

1. The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall, in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house they shall not be questioned in any other place. Senators and representatives to be paid, &c. Privileges.

2. No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States which shall have been created, or the emoluments whereof shall have been increased, during such time; and no person holding any office under the United States shall be a member of either house during his continuance in office. Disability to hold offices.

SECTION VII.

1. All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills. Revenue bills.

2. Every bill which shall have passed the House of Representatives and the Senate shall, before it become a law, be presented to the President of the United States; if he approve, he shall sign it; but if not, he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their The forms of proceedings on bills.

journal, and proceed to reconsider it. If, after such reconsideration, two thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two thirds of that house, it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

Ib. on joint resolutions, except for adjournment.

3. Every order, resolution. or vote to which the concurrence of the Senate and House of Representatives may be necessary, (except on a question of adjournment,) shall be presented to the President of the United States, and before the same shall take effect shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

SECTION VIII.

Congress have power to lay taxes, &c.

The Congress shall have power —

1. To lay and collect taxes, duties, imposts, and excises; to pay the debts, and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States:

2. To borrow money on the credit of the United States:

3. To regulate commerce with foreign nations, and among the several states, and with the Indian tribes:

4. To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States:

5. To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures:

6. To provide for the punishment of counterfeiting the securities and current coin of the United States:

7. To establish post-offices and post-roads:

8. To promote the progress of science and useful arts, by securing, for limited times, to authors and inventors the exclusive right to their respective writings and discoveries:

9. To constitute tribunals inferior to the Supreme Court: To define and punish piracies and felonies committed on the high seas, and offences against the law of nations:

10. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water:

11. To raise and support armies; but no appropriation of money to that use shall be for a longer term than two years:

12. To provide and maintain a navy:

13. To make rules for the government and regulation of the land and naval forces:

14. To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions:

15. To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states, respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress:

16. To exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased, by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings: and

17. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.

SECTION IX.

1. The migration or importation of such persons as any of the states now existing shall think proper to admit shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person. Importation of certain persons not to be prohibited until after 1808.

2. The privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it. Writ of habeas corpus.

3. No bill of attainder, or *ex post facto* law, shall be passed. Bills of attainder, &c.

4. No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken. Direct taxes.

5. No tax or duty shall be laid on articles exported from any state. No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another. No export duty, nor preference of one state to another, &c.

6. No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time. Money to be expended by legal appropriation only.

7. No title of nobility shall be granted by the United States, and no person holding any office of profit or trust under them shall, without the consent of the Congress, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state. Titles of nobility, &c.

SECTION X.

Powers forbidden to the states individually.

1. No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts; or grant any title of nobility.

Powers which the states can exercise only under the sanction of Congress.

2. No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any state on imports or exports shall be for the use of the treasury of the United States, and all such laws shall be subject to the revision and control of the Congress. No state shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

ARTICLE II.

SECTION I.

Executive power vested in a President, &c.

1. The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice-President, chosen for the same term, be elected as follows:

Electors of President and Vice-President, &c.

2. Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of senators and representatives to which the state may be entitled in the Congress; but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

Meeting of the electors of President, &c.

Their proceedings.

[3. The electors shall meet in their respective states, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same state with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit, sealed, to the seat of the government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose, by ballot, one of them for President; and if no person have a majority, then from the five highest on the list the said House shall, in like manner, choose

the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote: a quorum for this purpose shall consist of a member or members from two thirds of the states, and a majority of all the states shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them, by ballot, the Vice-President.*] [*Annulled. See amendments, art. 12.]

4. The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States. Time of choosing electors.

5. No person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States. Qualifications of the President

6. In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President, and the Congress may, by law, provide for the case of removal, death, resignation, or inability both of the President and Vice-President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected. In case of vacancy in the office of President, the Vice-President to act, &c.

7. The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them. Compensation of the President.

8. Before he enter on the execution of his office he shall take the following oath or affirmation: The President to take an oath.

"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect, and defend the Constitution of the United States."

SECTION II.

1. The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices; and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment. Powers of the President.

2. He shall have power, by and with the advice and consent of the Ib.

Senate, to make treaties, provided two thirds of the senators present concur: and he shall nominate, and by and with the advice and consent of the Senate shall appoint ambassadors, other public ministers, and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law. But the Congress may, by law, vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments.

Powers of the President.

3. The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

SECTION III.

Other duties and powers.

1. He shall, from time to time, give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed; and shall commission all the officers of the United States.

SECTION IV.

Officers liable to impeachment.

1. The President, Vice-President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

ARTICLE III.

SECTION I.

Judicial power.

1. The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may, from time to time, ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior; and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

Judges to hold their offices during good behavior, &c.

SECTION II.

Extent of the judicial power.

1. The judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states, between a state and citizens of another state, between

citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens, or subjects.

Original and appellate jurisdiction of the Supreme Court.

2. In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

Trial of crimes to be by jury, &c.

3. The trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

SECTION III.

Definition of treason.

1. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

Congress to declare its punishment.

2. The Congress shall have power to declare the punishment of treason; but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.

ARTICLE IV.

SECTION I.

Credit in one state to the public acts, &c. of another

1. Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

SECTION II.

Reciprocity of citizens.

1. The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

Criminals fleeing from one state to another to be delivered up on demand.

2. A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

Runaways to be delivered up.

3. No person held to service or labor in one state under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor; but shall be delivered up on claim of the party to whom such service or labor may be due.

SECTION III.

New states may be admitted into the Union, &c.

1. New states may be admitted by the Congress into this Union; but no new state shall be formed or erected within the jurisdiction of any other state, nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned, as well as of the Congress.

Congress to have power over territory, &c.

2. The Congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.

SECTION IV.

Republican form of government guaranteed to each state, &c.

1. The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and, on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.

ARTICLE V.

Mode of amending this constitution.

1. The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this constitution; or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes as part of this constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress, provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.

ARTICLE VI.

Assumption of former debts.

1. All debts contracted, and engagements entered into, before the adoption of this constitution shall be as valid against the United States under this constitution as under the confederation.

This constitution, &c. the supreme law; the state judges bound thereby.

2. This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby; anything in the constitution or laws of any state to the contrary notwithstanding.

Certain officers to take oath to support constitution.

3. The senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states,

shall be bound by oath or affirmation to support this constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States. No religious test.

ARTICLE VII.

1. The ratification of the conventions of nine states shall be sufficient for the establishment of this constitution between the states so ratifying the same. Ratification.

Done in Convention, by the unanimous consent of the states present, the seventeenth day of September, in the year of our Lord one thousand seven hundred and eighty-seven, and of the independence of the United States of America the twelfth. In witness whereof we have hereunto subscribed our names.

GEORGE WASHINGTON,
President, and Deputy from Virginia.

NEW HAMPSHIRE.
John Langdon,
Nicolas Gilman.

MASSACHUSETTS.
Nathaniel Gorham,
Rufus King.

CONNECTICUT.
William Samuel Johnson,
Roger Sherman.

NEW YORK.
Alexander Hamilton.

NEW JERSEY.
William Livingston,
David Brearley,
William Paterson,
Jonathan Dayton.

PENNSYLVANIA.
Benjamin Franklin,
Thomas Mifflin,
Robert Morris,
George Clymer,
Thomas Fitzsimmons,
Jared Ingersoll,
James Wilson,
Gouverneur Morris.

DELAWARE.
George Read,
Gunning Bedford, Jun.,
John Dickinson,
Richard Bassett,
Jacob Broom.

MARYLAND.
James M'Henry,
Daniel of St. Thomas Jenifer,
Daniel Carroll.

VIRGINIA.
John Blair,
James Madison, Jun.

NORTH CAROLINA.
William Blount,
Richard Dobbs Spaight,
Hugh Williamson.

SOUTH CAROLINA.
John Rutledge,
Charles Cotesworth Pinckney,
Charles Pinckney,
Pierce Butler.

GEORGIA.
William Few,
Abraham Baldwin.

Attest, WILLIAM JACKSON, *Secretary.*

[The following extract from the Journals of Congress shows the adoption of the Constitution, and the time when it took effect.]

IN CONGRESS.

SATURDAY, September 13, 1788.

On the question to agree to the following proposition, it was resolved in the affirmative by the unanimous votes of nine states, viz.: of New Hampshire, Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, Virginia, South Carolina, and Georgia.

The constitution declared to be ratified.

Whereas the Convention assembled in Philadelphia, pursuant to the resolution of Congress of the 21st February, 1787, did, on the 17th of September, in the same year, report to the United States in Congress assembled a constitution for the people of the United States; whereupon, Congress, on the 28th of the same September, did resolve unanimously, "that the said report, with the resolutions and letter accompanying the same, be transmitted to the several Legislatures, in order to be submitted to a convention of delegates chosen in each state by the people thereof, in conformity to the resolves of the Convention made and provided in that case"; and whereas the constitution so reported by the Convention, and by Congress transmitted to the several Legislatures, has been ratified in the manner therein declared to be sufficient for the establishment of the same, and such ratifications duly authenticated have been received by Congress, and are filed in the office of the Secretary; therefore,

Federal government to go into operation on the 4th of March, 1789.

Resolved, That the first Wednesday in January next be the day for appointing electors in the several states which before the said day shall have ratified the said constitution; that the first Wednesday in February next be the day for the electors to assemble in their several states, and vote for a President; and that the first Wednesday in March next be the time, and the present seat of Congress the place, for commencing proceedings under the said constitution.

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

[The following amendments were proposed at the first session of the first Congress of the United States, which was begun and held at the city of New York, on the 4th of March, 1789, and were adopted by the requisite number of States. 1 vol. Laws of the U. S. p. 72.]

ARTICLE I.

Restrictions on the powers of Congress.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of

speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

ARTICLE II.

Right of the people to keep arms, &c.

A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

ARTICLE III.

Quartering of soldiers, &c.

No soldier shall, in time of peace, be quartered in any house without the consent of the owner; nor in time of war, but in a manner to be prescribed by law.

ARTICLE IV.

Search-warrants, &c.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V.

Proceedings against persons charged with crimes.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Their rights.

ARTICLE VI.

Further rights.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence.

ARTICLE VII.

Right of trial by jury.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

ARTICLE VIII.

Excessive bail, &c.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX.

Construction of constitution.

The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people.

ARTICLE X.

Powers reserved to the states.

The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

[The following amendment was proposed at the second session of the third Congress. It is printed in the Laws of the United States, 1st vol. p. 73, as article 11.]

ARTICLE XI.

Restriction of judicial powers.

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

[The three following sections were proposed as amendments at the first session of the eighth Congress.
They are printed in the Laws of the United States as ARTICLE TWELVE.]

ARTICLE XII.

Mode of electing the President and Vice-President of the United States.

1. The electors shall meet in their respective states, and vote, by ballot, for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name, in their ballots, the person voted for as President, and in distinct ballots the person voted for as Vice-President; and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted; the person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers, not exceeding three, on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot,

President.

the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before

the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.

2. The person having the greatest number of votes as Vice-President shall be the Vice-President, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then from the two highest numbers on the list the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. Vice-President.

3. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States. Ib.

[In the edition of the Laws of the United States before referred to there is an amendment printed as article 13, prohibiting citizens from accepting titles of nobility, or honor, or presents, offices, &c., from foreign nations. But by a message of the President of the United States, of the 4th of February, 1818, in answer to a resolution of the House of Representatives, it appears that this amendment had been ratified only by twelve states, and therefore had not been adopted. See vol. v. of the printed papers of the 1st session of the 15th Congress, No. 76.]

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